Supreme Court, U. S.
FILED
FEB 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1235

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., D/B/A INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS,
PETITIONER,

v.

CENTRAL BROADCASTING CORPORATION,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

ROBERT H. GOLDMAN,
MICHAEL D. QUINLAN,

GOLDMAN & CURTIS,
144 Merrimack Street,
Lowell, Massachusetts 01852.
(617) 454-8804
Attorneys for the Petitioner

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

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CENTRAL BROADCASTING CORPORATION,
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Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Introductory Statement.

The National Association of Government Employees, d/b/a International Brotherhood of Police Officers, petitions this Court for a writ of certiorari to review a judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Opinion Below.

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at page 2485 of the 1979 Massachusetts Advance Sheets, appended hereto as Appendix A, pp. 27-40 and at 396 N.E. 2d 996.

Jurisdiction.

The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on the thirteenth (13) day of November, 1979, and is appended hereto as Appendix A, pp. 27-40. Jurisdiction of this Court is conferred by 28 U.S.C. § 1257.

Questions Presented.

1. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts erred in reversing the lower court's order denying respondent's motion for summary judgment on the ground that the statements complained of were mere expressions of opinion, protected by the First Amendment.

2. Whether the Supreme Judicial Court erred in holding that petitioner, National Association of Government Employees, Inc., d/b/a International Brotherhood of Police Officers, is a "private figure," thereby making inapplicable the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

3. Assuming, *arguendo*, petitioner is a public figure, whether the Supreme Judicial Court of the Commonwealth of Massachusetts erred in reversing the lower court's order denying respondent's motion for summary judgment on the ground that no genuine issue of material fact existed as to the "actual malice," the standard announced in *New York Times Co. v. Sullivan*.

Constitutional Provisions and Statutes Involved.

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of a religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Statement of the Case.

Petitioner, National Association of Government Employees, Inc. ("Union") is a nonprofit corporation conducting business as a labor union, and operating nationally. One of its divisions is known as the International Brotherhood of Police Officers, of which Local 398, composed of members of the Police Department of the Town of Ware, Massachusetts, is a member. Respondent, Central Broadcasting Corporation ("Station"), is the licensee of radio station W.A.R.E., which maintains broadcasting facilities and executive offices in the Town of Ware.

For a period of time prior to January 25, 1977, the Union was engaged in collective bargaining with the Ware Board of Selectmen, consisting of three members, in an effort to conclude a new employment contract. On that date the Board with the exception of its Chairman, Abraham Goodman, signed an agreement with the Local 398. The agreement required approval and funding by the voters of the Town of Ware and was scheduled to come before a Special Town Meeting on February 22, 1977.

On February 2, 1977, the Union's Executive Director, William Norton, communicated in a letter to Mr. Goodman his belief that "when a majority of the Board of Selectmen have reached a contractual agreement they have an affirmative obligation to support and defend its position before the town meeting members." Appendix B, pp. 79-80. Thereafter,

in a letter dated February 12, 1977, to the Federal Communications Commission ("FCC"), Mr. Norton complained of the Station's alleged "vendetta" against members of the Ware Police Department in its news items and on the Station's talk show. Appendix B, pp. 82-84. The Ware River News, the local newspaper, published the text of the letter to the FCC, and comments by Mr. Goodman and the Station's Executive Vice President.

On February 17, 1977, Mr. Goodman telephoned "Sound Off," the Station's regularly scheduled open-forum radio program, which invites members of the public to call in their questions, views and comments for "live" broadcast. Mr. Goodman first identified himself to the program's announcer, Jacquelyne Murphy, after which the following colloquy, in pertinent part,[1] ensued:

"[MR. GOODMAN]: Well, I'm very angry at the moment.

ANNOUNCER: Why is that?

[MR. GOODMAN]: Because we're supposed to be living in a free and democratic country and I don't think we are. This episode with the police union making demands on the station as well as myself, I want to go on record publicly that I will support the station a hundred percent.

ANNOUNCER: Thank you very much.

[MR. GOODMAN]: Because, if we do not get together and stop the inroad of communism, something will happen.

[1] The entire conversation is found in Appendix B, pp. 92-97. A ten-second tape delay system was available for use throughout the program. Appendix B, p. 90.

ANNOUNCER: Well, I agree with everything you're saying . . . .
. . .

[MR. GOODMAN]: Well, I hope so. But, again, I want to say that if there is anything I can help the station towards fighting the inroads of communism which in this particular case is the union, police union, I will be glad to help.

ANNOUNCER: Well, I thank you very much, Sir and I just . . . think that, uh, what we all have to do is just be very big people and not stoop to a very low level.

[MR. GOODMAN]: That's right.

ANNOUNCER: O.K. Thank you very much for your call."

At some point later in the program an unidentified caller had the following conversation[2] with Ms. Murphy:

"ANNOUNCER: This is Sound Off. I'm Jackie, we have a couple of minutes left in the program on an open forum. Sound Off, you're on the air.

CALLER: I'd like to express my opinions on the Police Department.

ANNOUNCER: O.K.

CALLER: Now it's been a proven fact that the Town of Ware has the lowest crime rate in this part of the state. Now I believe that the state has a very light cri- crime rate, that has been proven that it has gone up over the past

[2] The entire conversation is found in Appendix B, pp. 97-101.

months at a steady increase. Now where does Mr. Goodman come off calling the Police Department Communists on an outrate basis saying that the Police in one sense of the word are Communists?

ANNOUNCER: Well, if, if I can interpret what he's saying, uh, myself, I would think that what he is driving. . .

CALLER: Now, wait a minute. A police officer in this state becomes a police officer because he is concerned about his country and his community. Now, this is one main factor a man becomes a police officer.

ANNOUNCER: Well, I would, I would hope that is the reason.

CALLER: . . . .an outrate statement that the Police Department is Communist." . . .

On February 22, 1977, voters at the Special Town Meeting voted against funding the contract.

Thereafter, the Union commenced a defamation action in Superior Court for money damages against the Station.[3] The Station's responding motion to dismiss was denied in a written opinion in which the court concluded that "the language with innuendos capable of being drawn therefrom are reasonabl[y] susceptible of a defamatory meaning." Appendix B, pp. 62-64. The Station then filed its answer,[4] and a request for admission. Appendix B, pp. 65-68.[5] Thereafter, the

[3] Abraham Goodman was also named a defendant, but the action was dismissed as to him pursuant to a settlement agreement involving a full retraction which was broadcast by the Station.

[4] In its answer, at paragraph 1, the Station does not deny the Union's "good reputation," and that it is "reputable, devoted to the interests of its members, patriotic, honest, and carrying on its activities in accordance with law." Appendix B, p. 14.

[5] The Supreme Judicial Court questioned whether the averment of damages, considering the amount ($3,000,000.00), was justified.

Station filed a motion for summary judgment under Mass. R. Civ. P. 56, supported by, *inter alia*, affidavits of Richard H. Vaughan and Jacquelyne Murphy. Appendix B, pp. 74-101. In opposition to the Station's motion, the Union filed an affidavit of William Norton. Appendix B, pp. 102-105. On September 12, 1978, the Station's motion was denied without opinion. The Station applied to a single justice of the Appeals Court for relief from the interlocutory order of denial which the single justice granted by way of authorizing the Station to pursue an appeal from the order in the Appeals Court. Appendix B, pp. 106-107. When the appeal was lodged there, and after the briefs had been filed, the Supreme Judicial Court took it *sua sponte* for direct review. The Supreme Judicial Court reversed the lower court's ruling for summary judgment in favor of the Union and ordered that judgment be entered for the Station. Appendix A, p. 40.

Reasons for Granting the Writ.

1. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION BELOW, IN HOLDING THAT THE STATEMENTS COMPLAINED OF WERE MERE EXPRESSIONS OF OPINION, CONTRAVENES THE FIRST AMENDMENT OF THE FEDERAL CONSTITUTION AND IS CONTRARY TO ESTABLISHED PRECEDENT.

The Supreme Judicial Court's opinion asserting that the Station was entitled to summary judgment on the grounds, *inter alia*, that the statements complained of were expressions of mere opinion was based upon "independent but con-

The Union responds that it is a national union of police officers and government employees and believed in good faith at the time it commenced suit that the potential and actual damage from the widespread dissemination of the "Communism" allegations vis-a-vis rival unions and the public could equal, and indeed, surpass the amount referred to in its ad damnum.

verging lines of authority." Appendix A, p. 32. Firstly, the court, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), determined that the complained of allegations disseminated by the Station were entitled to "full First Amendment protection including freedom from civil liability," since they were expressions of opinion based upon disclosed and apparent facts. Appendix A, pp. 32-35. Secondly, the court determined that, considering the circumstances under which the statements were made, the words would "most likely be taken by the audience as mere pejorative rhetoric. . . ." Appendix A, pp. 35-36. The court, relying on *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974) and *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), stated its belief that the Supreme Court would consider the allegation "communist" in the same vein as it had the word "fascist," *i.e.*, an unamiable but nonlibelous utterance. Appendix A, p. 36.

It would appear that full First Amendment protection, including freedom from civil liability inheres to pure expressions of opinion, *Gertz v. Robert Welch, Inc.*, 418 U.S. at 339-40. It is noteworthy that in *Gertz* the alleged defamatory statements included the representations that plaintiff, a successful and concededly reputable attorney, was a "Leninist" and a "Communist Fronter." *Id.* at 326. The lower court determined that the allegations were libelous *per se* and, at least impliedly, were not expressions of opinion protected under the First Amendment. 306 F. Supp. 310 (N.D. Ill. 1969). This conclusion was not disturbed on appeal to the Court of Appeals, 471 F. 2d 801, 802 (7th Cir. 1972) (Stevens, J.) and to the Supreme Court.

Illuminating the distinction between fact and opinion was a case decided on the same day as *Gertz, Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin,*

supra. There the Court concluded that plaintiffs, non-union postal workers, who were referred to as scabs, using author Jack London's purported definition,[6] in literature distributed by the union could not recover in a defamation action without a showing of *New York Times* (actual) malice since the statements were made in the course of a labor dispute. The Court further made finding that the reference to plaintiffs as scabs was technically accurate and that the language of London's definition of a scab could not be construed as representations of fact but merely as rhetorical hyperbole. The Court noted that there was "no evidence that anyone took literally the use of the word 'traitor'." *Id.* at 285-86, n. 16.

In *Letter Carriers,* Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, dissented for the reason, *inter alia,* that

> "[s]o construed, the plain meaning and import of this publication was that appellees lacked character, that they had 'rotten principles,' and that they were traitors to their God, their country, their families, and their friends. *Appellants make no attempt to prove the truth of these accusations, contending instead that they were mere hyperbole involving no statement of fact.* The majority accepts this argument, in my view erroneously.

It seems to me that the majority fails to distinguish between defamatory references to any anonymous group, class, or occupation, and a similar description of a

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[6] "The Scab

. . . The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class." *Letter Carriers,* 418 U.S. at 268.

named individual. It is one thing to say that lawyers are shysters and that doctors are quacks, but it is quite another matter—indeed, it is libellous *per se*—to publish that lawyer Jones is a shyster or that Dr. Smith is a quack. Here the union did not merely voice its opinion of of 'scabs' generally; *it identified these appellees by name and specifically impugned their character.*" (Emphasis supplied.) *Id.* at 296-97.

Upon a thoughtful and critical reading of this Court's decision in *Gertz* and *Letter Carriers,* including the dissent therein, it should be evident that the allegations complained of are not mere expressions of opinion protected under the First Amendment, but rather allegations of fact. Mr. Goodman's language was simple and direct and the intent and meaning his words were meant to convey to Ms. Murphy and the Station's listening audience were equally clear and unambiguous: the Union represented an inroad of Communism. In other words, the Union was attempting the ruthless suppression of individual liberties, of all opposition to its political philosophy or position, and was attempting to establish an authoritarian rule, see Webster's New Universal Dictionary 367 (unabridged ed. 1970), as well as subverting freedom of expression and that the Union was affiliated with or sympathetic to the Communist Party. In addition, Ms. Murphy implied that she had facts within her possession to show that as part of the Union's alleged efforts to pursue its Communist course the Union would "arrest" citizens at the town meeting who exercised their rights of free speech.[6A]

[6A] "ANNOUNCER: But, of course, ah, you have to look at it this way, if you do talk and they arrest you at least you get a first hand look at the lockup. (Laughs).

CALLER: [Mr. Goodman] Well, that's right, but I should be given the opportunity to express my opinion why I feel one way or another." Appendix B, p. 96.

Furthermore, as in the *Letter Carriers* case, the allegations of representing the inroads of Communism in this case were not merely made in the abstract. On the contrary, they were directed at a specific and identifiable class of individuals: the members of the police department of the Town of Ware who belong to Local 398 of the Union. Appendix B, p. 96.

The allegation of representing an inroad of Communism is particularly devastating to members of Local 398: police officers who take a solemn oath swearing to uphold the laws of the state and the country. Appendix B, p. 103.[7] And, unlike the reference to scab in the *Letter Carriers* case, which this Court determined was factually and technically true, the Station has not attempted to show the truth of its allegations, and indeed cannot, since in its answer the Station admits that the Union is reputable, devoted to the interests of its members, patriotic, honest and carrying on its activities in accordance with law. Appendix B, p. 65.

With respect to the Supreme Judicial Court's conclusion that the allegation " 'communism' would most likely be taken by the audience as mere pejorative rhetoric. . ." Appendix A, p. 36, it is belied by the subsequent unidentified caller's remarks to Ms. Murphy.

"CALLER: I'd like to express my opinions on the Police Department.

ANNOUNCER: O.K.

CALLER: *. . . Now where does Mr. Goodman come off calling the Police Department Communists on an outrate basis saying that the Police in one sense of the word are Communists?*

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[7] Indeed, it is a violation of Article V, Section 1(h) of the Union's constitution or By-laws to join or lend "active support to any organization or movement whose purposes or objectives are contrary to the fundamental principles of the established government of the United States of America, such as a Communist or Fascist movement." Appendix B, p. 103.

. . .

CALLER: . . . *an outrate statement that the Police Department is Communist.*" (Emphasis supplied.) Appendix B, pp. 97-98.

Furthermore, the Union directs this Court's attention to a letter by the Union's local membership to Richard Vaughan, the Station's Executive Vice President.[8] In it the membership declines Mr. Vaughan's invitation to appear on the "Sound Off" program because "W.A.R.E.'s support of Mr. Goodman's position after he alleged that members of the International were Communist was too overwhelming to accept." Appendix B, pp. 87-88. Quite clearly, at least this segment of the listening audience perceived Mr. Goodman's remarks as essentially an assertion of the fact of Communist affiliation or sympathy contrary to the conclusion of the Supreme Judicial Court.[9] As Judge Harold Leventhal stated in related circumstances, "[w]hat counts is not the painstaking parsing of a scholar in his study, but how the newspaper article is viewed through the eyes of a reader of average interest. . . . Where readers would understand a defamatory meaning liability cannot be avoided merely because the publication is cast in the form of an opinion, belief, insinuation or even question." *Afro-American Publ. Co. v. Jaffe,* 366 F. 2d 649, 655 (D.C. Cir. 1966) (citation omitted) (with Burger, J., joining in the majority opinion).

For example, *Phoenix Newspapers, Inc. v. Church,* 103 Ariz. 582, 447 P. 2d 840 (1968), *second appeal,* 24 Ariz. App. 287, 537 P. 2d 1345 (1975), *appeal dismissed, cert. denied,* 425 U.S. 908 (1976), the plaintiff, while Attorney General of Arizona, advocated in a speech, accurately reported in defendant's newspapers, that labor unions, minorities, and others organize a "people's council" to counteract the impact of lobbyists for business interests. An editorial in defendant's

[8] The letter is incorporated in Mr. Vaughan's own affidavit. Appendix B, p. 87.

[9] See Appendix A, p. 36.

newspapers characterized the "people's council" as a device central to the practice of communism, and suggested plaintiff's advocacy of such a council as evidencing communist sympathies. In letters to the newspaper, one writer characterized the suggestion as an insult to his intelligence, while another congratulated the newspaper "on the fine job you are doing exposing communists in government." *Id.,* 447 P. 2d at 854. The Arizona court refused to find the assertion protected as opinion or fair comment based upon stated or indicated facts because of the reader's perception of the comment as an assertion of fact, combined with the specificity of the language used and the insufficiency of the connection of such language to the supporting facts. *Id.,* 447 P. 2d at 846.

The reasoning utilized in the *Phoenix* case bears equal application to the case *sub judice:* The Supreme Judicial Court determined that "no matter how invidious or derogatory the expression 'communism' is conceived to be," it is not actionable and subject to full First Amendment protection because its "factual ingredient" is known or assumed. Appendix A, p. 33.

As the court stated, the factual ingredient consisted of the substance of the Union's (1) letter of February 2, to Mr. Goodman stating it took "issue with any attempt by you to speak against the agreement at town meeting based on prior state and court rulings," and (2) request to the Federal Communications Commission that it "conduct a full scale investigation . . . to determine if station WARE is fit to retain its license." Appendix A, p. 33.

As in the *Phoenix* case, the Union respectfully asserts that the "facts" identified by the Supreme Judicial Court are wholly insufficient in relation to Mr. Goodman's assertion to support a bona fide opinion that the Union represented the inroads of Communism. Significantly, in the Union's letter of February 2, Mr. Norton was careful to identify the legal sup-

port on which the Union was basing its position.[10] Appendix B, pp. 79-80. Mr. Goodman thereby could judge for himself the propriety of the Union's position.[11] This can hardly be characterized, as Mr. Goodman chose to do, as representing a communist inroad which is an idea inherently involving intimidation, blackmail, terrorism, and the seizure of power through unlawful acts thereby destroying the democratic form of government; or at least "an attempt to subvert free speech (and in that sense resemble communist tactics)" Appendix A, p. 33. Nor can the Union's request to the Federal Communications Commission for an investigation of the Station's fitness to retain its license be considered, even remotely, an inroad of Communism. The FCC in its enabling legislation specifically provides that "any party in interest may file with the Commission a petition to deny any application," 47 U.S.C. § 309(d)(1). See Public and Broadcasting (rev. ed.) Procedure Manual; Federal Register, Thursday, September 5, 1974, vol. 39, No. 173, Part 3, Para. 5, p. 32288. That being so, it is difficult to comprehend how the exercise of a federally guaranteed right can constitute an inroad of Communism. Ms. Murphy must have been implying facts allegedly known to her, but not set forth, that the Union in exercising this right was acting with a knowledge that its letter was made in

[10] Mr. Norton relied upon a decree of the Superior Court ordering the Dracut Board of Selectmen, including successor members, to sponsor, support, and recommend favorable action on a collective bargaining contract a majority of the Board had entered into. Under these circumstances, characterizing Mr. Norton' statement as "exceedingly rash and ill advised" is, very respectfully, a rather harsh judgment. It was not until over fourteen months later that the Supreme Judicial Court determined successor members of the Board cannot be required to publicly endorse the terms of the collective bargaining agreement negotiated by their predecessors. *Labor Relations Commission v. Board of Selectmen of Dracut*, Mass. Adv. Sh. (1978) 657, 665, 373 N.E. 2d 1165, 1170.

[11] *Id.*

bad faith, and without any belief in the contentions therein set forth.

Clearly, as in the *Phoenix* case, the allegedly supporting facts bear no relation to the specific charge of Communism directed at the Union. Accordingly, the assertion of Mr. Goodman, disseminated by the Station, cannot be reasonably regarded as an expression of opinion subject to full First Amendment protection as the Supreme Judicial Court held but rather must be regarded as an allegation of fact and the proper basis of a defamation suit.

2. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION BELOW, IN HOLDING THE UNION TO BE A PUBLIC FIGURE, CONTRAVENES THE FIRST AMENDMENT OF THE FEDERAL CONSTITUTION AND IS CONTRARY TO ESTABLISHED PRECEDENT.

Limitations on the power of state courts to award damages in libel actions were established in a line of decisions of this Court beginning with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), wherein, the Court held that a public official may not recover damages in libel or slander against critics of his official conduct except on a showing of "actual malice," *i.e.*, knowledge of falsity or reckless disregard of the truth. *Id.* at 280. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court determined that in cases where the plaintiff is a private individual, states are free to adopt a less demanding standard, so long as they avoid the imposition of liability without fault. Responding to this invitation our Supreme Judicial Court in *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849 (1975) held that private persons, as distinguished from public officials and public figures, may recover compensation on proof of negligent publication of a defamatory falsehood. In *Gertz*, the Court recognized two categories of public figures: an individual who achieves "such pervasive fame or notoriety that he becomes a public figure for all pur-

poses and contexts," and "[m]ore commonly, an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 351. The Supreme Court has further amplified on the holding in the *Gertz* case in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), and more recently in *Hutchinson v. Proxmire*, — U.S. —, 99 S. Ct. 2675 (1979) and *Wolston v. Reader's Digest Association, Inc.*, — U.S. —, 99 S. Ct. 2701 (1979).

The Union contends that under *Gertz* and its progeny it does not qualify as a public figure under the first category.[12] Although the record does contain admissions that officials and members of the Union attempted to persuade "various citizens of the Town of Ware" to vote in favor of the proposed contract, Appendix B, p. 70, and evidence of newspaper coverage, *id.* at 81, there are no facts indicating "pervasive fame or notoriety" in the community.

> "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 352.

Nor can it be said that the Union is a public figure for a limited range of issues. Fundamental to *Gertz* and other decisions was the Court's determination as to the nature of the activity each of the plaintiffs had undertaken. In *Gertz*, the plaintiff's role was limited to representing his client in a civil action unrelated to the criminal trial in issue; in *Firestone* it was limited to seeking redress in a state court; in *Wolston* it

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[12] The Supreme Judicial Court, on this point, summarily stated its view that "[i]f not an all-purpose public figure, this public-employee union was surely a public figure of limited range as matter of law . . . ." Appendix A, p. 37, n.12.

was in simply failing to respond to a grand jury subpoena; and in *Hutchinson*, it was much like those of "countless members of his profession," *i.e.*, plaintiff's role was limited, he had not thrust himself or his views into public controversy to influence others.

Similarly, in this case the Union's role was strictly limited to fulfilling its obligation as the bargaining representative, and providing certain benefits for its local membership. Appendix B, p. 104. And part of this obligation was to represent its members' interests to the very individuals, the citizens of the Town of Ware, who would be called upon to determine whether to approve and fund the proposed contract.

For this reason, the Union can no more be said to have voluntarily thrust itself into the vortex of the public issue than did Attorney Gertz who represented his clients in a civil suit or Mrs. Firestone who was compelled to go to court by the laws of Florida in order to obtain a divorce. Thus, the Union was only acting to fulfill its representative obligations to its members.

The Union would further note that Mr. Goodman's remarks, which are the basis of the Union's action, bore no relation whatsoever to the merits of the proposed contract but, instead, were intended as a personal assault against the Union's character and reputation. Thus, under these circumstances the Union can not be deemed to be a public figure and may recover upon proving the Station acted *negligently* in publishing the complained of statements. The plaintiff believes that the record amply shows "recklessness," as shown below (pp. 18-26). The negligence test (*i.e.*, carelessness and acting in an unreasonable manner under all the circumstances), if that is the less rigorous standard applicable to Ms. Murphy's actions, is clearly met.

3. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION BELOW, IN HOLDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT ON THE QUESTION OF CONSTITUTIONAL ("ACTUAL") MALICE, CONTRAVENES THE FIRST AMENDMENT OF THE FEDERAL CONSTITUTION AND IS CONTRARY TO ESTABLISHED PRECEDENT.

In a libel action brought by a *public figure,* the plaintiff must establish at trial with "clear and convincing evidence" that the defamatory falsehood was published with actual malice, *i.e.,* with knowledge that it was false, or reckless disregard of whether it was false. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974); see *Stone v. Essex County Newspapers, Inc.,* 367 Mass. 849, 866 (1975). This is an entirely subjective standard: the jury must find that the requisite knowledge or doubt in fact was entertained by the defendant. *St. Amant v. Thompson,* 390 U.S. 727, 730-31 (1968). Thus, proof of actual malice focuses solely on the often complex question of determining the state of mind of the defendant. See, *e.g., Herbert v. Lando,* — U.S. —, 99 S. Ct. 1635 (1979).

Despite the obvious difficulty in determining that issue, a number of federal courts have adopted the position that in determining whether a plaintiff had made an adequate showing of actual malice, summary judgment might well be the *rule rather than the exception. E.g., Hutchinson v. Proxmire,* 431 F. Supp. 1311, 1330 (W.D. Wis. 1977); *Oliver v. Village Voice, Inc.,* 417 F. Supp. 235, 237 (S.D. N.Y. 1976).

The validity of that position, however, is subject to doubt considering this Court's comment in *Hutchinson v. Proxmire.* The Court responded in footnote 9 of the 8-1 majority opinion, to the lower court's observation (see *Hutchinson v. Proxmire,* 431 F. Supp. at 1330) drawn from an examination of other federal, although not Supreme Court decisions, that

where "actual malice" must be shown, summary judgment "might well be the 'rule' rather than the exception."

> "Considering the nuances of the issues raised here, we are constrained to express some doubt about the so called 'rule.' The proof of 'actual malice' calls a defendant's state of mind into question, *New York Times v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed. 2d 686 (1964), and does not readily lend itself to summary disposition. See 10 Wright & Miller, Federal Practice and Procedure § 2730, at 590-592. Cf. *Herbert v. Lando,* — U.S. —, 99 S.Ct. 1635, 60 L.Ed. 2d 115 (1979)." *Hutchinson v. Proxmire,* — U.S. —, 99 S. Ct. at 2680-2681, n.9 (1979).

In its decision, the Supreme Judicial Court concluded the Union would be unable as a matter of law on the evidence in the record to sustain its burden of showing by clear and convincing[13] evidence that Ms. Murphy adopted the statements complained of "with knowledge that it was false or with reckless disregard of whether it was false or not." Appendix A, p. 37. The Court's conclusion was based on the fact that Ms. Murphy stated at the close of the second segment of the radio program that she only understood Mr. Goodman to be attacking the Union for trying to stifle criticism of the labor contract. Appendix A, p. 38.

Initially, the Union very respectfully contends that the Supreme Judicial Court erred in grafting the "clear and convincing" standard onto the Union's burden of proof on summary judgment. The question of what quantum of evidence is necessary to overcome a defense motion for summary judgment in a libel action brought by a public figure[14] has been

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[13] The Supreme Judicial Court decided, apparently, that the Union's burden of proof on summary judgment must be "clear and convincing." Appendix A, p. 37.

[14] The Union, of course, strongly contends that it is not a public figure, see section 2, *infra.*

determined by a number of lower federal courts and state courts, most recently in *Nader v. deToledano,* 408 A. 2d 31 (D.C. Ct. App. 1979). In *Nader*, the court, after extensively discussing the varying approaches to this problem, concluded that a plaintiff need only present evidence which shows "a genuine issue of material fact from which a reasonable jury *could find* actual malice with convincing clarity." *Id.* at 49 (emphasis in original). Thus, the plaintiff is not required to prove malice to the court because that would of necessity require a weighing of evidence by the court. *Id.*

But, even this use of the "convincing clarity" standard similarly necessitates a weighing of evidence by the court. The Union respectfully suggests that the more appropriate standard, one insuring the traditional roles of judge and jury, would require the denial of a defensive motion for summary judgment if there is *any* evidence from which a jury could find actual malice, "and that it is for the jury alone to determine whether that evidence is 'clear and convincing'." See *Stone v. Essex County Newspapers, Inc.,* 367 Mass. at 877-78 (Quirico, J., concurring in part and dissenting in part). While not expressly stated, this principle conforms to this Court's candid recognition that considering the "nuances" involved in determining subjective state of mind, resolution of this issue "does not readily lend itself to summary disposition." *Hutchinson v. Proxmire,* — U.S. —, n.9, 99 S. Ct. at 2680-81, n.9 (1979).[15] It seems clear that the reason why granting

[15] While the District Court in *Hutchinson* did not expressly apply the "clear and convincing" standard in deciding the motion for summary judgment, the initial case on which it relies, *Meeropol v. Nizer,* 381 F. Supp. 29 (S.D. N.Y. 1974), clearly applied that standard on the motion for summary judgment before it. Accordingly, since the text to which the Supreme Court's footnote relates, expressly refers to the District Court's reliance on other cases, the

defensive summary judgment motions in constitutional malice libel actions became "the rule rather than the exception" is *exactly* because courts *grafted* the "clear and convincing" rule in determining these nuances and necessarily determining credibility, onto the summary judgment procedure.

In summary, the Union respectfully contends that since credibility is normally a matter for the trier of facts to pass on at a live trial, it is not the trial court's function to pass upon credibility or to use the "clear and convincing" rule with respect to "state of mind," as did the Supreme Judicial Court in the case *sub judice,* see Appendix A, p. 37, in evaluating the evidentiary material in support of, and in opposition to, the motion for summary judgment. See 6 *Moore's Federal Practice,* ¶ 56.02[10] at 45 (2d ed. 1976); *Vandenberg v. Newsweek, Inc.,* 441 F. 2d 378, 380 (5th Cir.), *cert. denied,* 404 U.S. 864 (1971) ("Proof of such a mental state [actual malice] must usually be inferred from circumstances difficult to develop on a motion from summary judgment").

The Union respectfully asserts that even applying the stricter "clear and convincing" rule as the Supreme Judicial Court did, and *a fortiori,* the less restrictive standard, the Supreme Judicial Court's conclusion that no genuine issue of material fact existed as to "actual malice" was unwarranted. Specifically, the evidence detailed in the following paragraphs raises genuine issues of material fact with respect to whether Ms. Murphy entertained "actual malice" at the time of the broadcast of the matters complained of.

1. Ms. Murphy's response to Mr. Goodman's allegation that the Union represented the inroads of communism was clear and unambiguous: "[w]ell, I agree with everything

Court's criticism seemingly applies to those other cases as well and, impliedly, to their incorrect use of the clear and convincing rule on summary judgment.

you're saying." Viewed in the light most favorable to the Union, Ms. Murphy's intent and meaning in conveying this statement, and the inference reasonably drawn from it, in the context in which the statement was made, clearly indicates that she (1) was aware Mr. Goodman intended to convey a particular meaning by his comments; (2) understood the meaning to be an accusation that the Union represented an inroad of Communism; and (3) agreed, in fact, with that meaning and its application to the Union.[16]

Coupled with this understanding and agreement is the reasonable inference, if not outright expression, of the fact that Ms. Murphy knew the Union was not connected, directly or indirectly, with Communism. In her affidavit Ms. Murphy states that she "had never discussed the subject of whether the [Union] is connected with Communism or not with Mr. Goodman or any other party." Appendix B, p. 91. Furthermore, in the Station's answer, it does not dispute the Union's allegations with respect to the Union's reputation. Appendix B, p. 65. Specifically, the Station does not deny that the Union is "reputable, devoted to the interests of its members, patriotic, honest and carrying on its activities in accordance with law." Appendix B, p. 61.

The Union very respectfully urges that the Supreme Judicial Court erred in finding that Ms. Murphy's "statement at the *close* of the broadcast[17] describes her state of mind."

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[16] Bearing on these contentions is the fact that Ms. Murphy admittedly was not a neophyte broadcaster with a proclivity to making flippant or careless remarks. On the contrary, she was a seasoned announcer who has interviewed "hundreds of people, including such persons as Senator Ted Kennedy, Governor Michael Dukakis, and State Treasurer Robert Crane. . . ." Appendix B, pp. 91-92.

[17] Further undermining this conclusion is Ms. Murphy's allegation in her colloquy with Mr. Goodman to the possibility of his arrest for speaking against the contract at the town meeting, Appendix B, p. 96, admittedly a Communist tactic.

Appendix A, p. 38 (emphasis supplied). On the contrary, the Union respectfully contends that Ms. Murphy's state of mind was accurately evidenced by her earlier unequivocal agreement with Mr. Goodman's remarks. Appendix B, p. 93. The fact that at a *later* point in time near the close of the program her statements to another, unidentified caller indicating what she purportedly understood Mr. Goodman's remarks to mean, diverge from the plain meaning of earlier statements and present, at the very least, a critical question of credibility. Considering the "nuances" this issue raises, the Union asserts it is a matter better left within the purview of a jury's fact-finding role and, therefore, what Ms. Murphy's intent was in this regard should be left to its determination.

For all it appears, members of the audience may have only been listening to the initial, and not the later portion of the broadcast. In this regard, the circumstances are analogous to a newspaper which publishes allegedly defamatory material in its first edition only to explain in a later edition that no defamation was intended.

2. Mr. Norton, in his affidavit, states that Ms. Murphy *knew* of the police Union's excellent reputation in the community and that it was not, directly or indirectly, involved with a Communist movement or infiltration by Communists into local government. Appendix B, p. 104. This conclusion is supported by Ms. Murphy's own affidavit and the Station's answer. See paragraph 1, *infra*. Mr. Norton states further that Ms. Murphy, knowing these facts, deliberately allowed the statements complained of to be broadcast as part of the Station's concerted effort to undermine the reputation of the police department.[18] Appendix B, p. 104. Mr. Norton, in his letter to the FCC further elaborated on the Station's alleged

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[18] While Mr. Norton prefaced this statement with the phrase "on information and belief" Appendix B, p. 104, since there was no motion to strike these matters, any formal defects contained in the affidavit are deemed to be waived, *Associated Press v. Cook*, 513 F.

campaign against the Union. Appendix B, pp. 82-84. Against this backdrop, the Union respectfully asserts that a genuine issue of material fact exists as to Ms. Murphy's state of mind with respect to "actual malice."

3. The very format of the Station's "Sound-Off" program provides sufficient evidence of reckless disregard of the truth to constitute actual malice. The "Sound-Off" program is a regularly scheduled open radio program in which members of the listening audience were invited to telephone into the Station with questions or comments. Appendix B, p. 90. The announcer has at her disposal a "tape delay system which tape records the conversation being broadcast (to include telephone calls made by members of the listening audience) and delays the transmission for approximately ten seconds. The device is controlled by a push button (the 'abort button')." *Id.*

The Union contends that the Station's policy and, in fact, deliberate course of conduct were to solicit comments or questions from its listening audience for subsequent transmission without regard, with one exception, to the content and truthfulness of what is said. According to Ms. Murphy's own sworn statement, she used the abort button "very rarely, and *only to screen out obscenity.*" Appendix B, p. 90 (emphasis supplied). Presumably, a caller's remarks would be broadcast over the Station regardless of how insidious, critical or defamatory they might be just so long as Ms. Murphy did not consider them "obscene." It requires little imagination to conceive of statements recklessly debasing the character of an individual which according to the Station it

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2d 1300, 1303 (10th Cir. 1975), 6 (Part 2) *Moore's Federal Practice,* ¶ 56-1330 (2d ed. 1976), and, in any event, the Court could, in its discretion, accept the facts asserted. *Stetson v. Board of Selectmen of Carlisle,* 369 Mass. 755, 763, n.12 (1976). The Supreme Judicial Court does not dispute this fact in its opinion.

could broadcast with complete impunity and without the threat of a libel judgment. The Union fails to understand how such a course of conduct advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan,* 376 U.S. at 270.

Mr. Goodman's defamatory remarks epitomize the type of incident which the Station encourages by adopting the free-wheeling procedure utilized in broadcasting its "Sound-Off" program. Despite the fact that Mr. Goodman had accused members of the police force of the Town of Ware, individuals sworn to uphold the law, of representing the inroads of Communism, Ms. Murphy *independently* determined that these statements were worthy of publication.

> "I did not consider aborting any part of Mr. Goodman's remarks because the letters concerned Mr. Goodman and been made public by the [Union], and I believed, and still do, that Mr. Goodman *had a right to respond publicly.*" Appendix B, p. 91 (emphasis supplied).

Whether Ms. Murphy or the Station believed that Mr. Goodman had a right to respond irrespective of the law of libel is, of course, of no relevance. The nature of those remarks and controlling principles of law are determinative. See *Snowden v. Pearl River Broadcasting Corp.,* 251 So. 2d 405 (La. App.), *aff'd,* 253 So. 2d 217 (1971).[19]

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[19] In *Snowden,* a radio program strikingly similar to the one in question, entitled "Call and Comment" was broadcast over the defendant's facilities. The Union believes that the Court's discussion of the defendant's recklessness in adopting such a format bears repetition.

> *"Appellant could have effectively monitored the program by the use of tape recorders or delayed broadcast equipment.* For the reasons above noted, it did not choose to do so . . . In our judgment, the First Amendment does not protect a publisher against such utter recklessness." *Id.,* 251 So. 2d at 410-11 (emphasis supplied).

It is noteworthy that in paragraph 7 of Ms. Murphy's affidavit the only reason she identifies for the failure to abort Mr. Goodman's remarks is her belief that he had a right to respond publicly. Appendix B, p. 91. At this point in her affidavit she gives no other reason for not aborting Mr. Goodman's remarks, for example, because she did not consider them defamatory. The Union believes that at the very least this raises a jury question on the issue of "actual malice." To hold otherwise would be to immunize the Station from liability for the broadcast of defamatory matter simply because it has taken the precaution of broadcasting live or, rather, with a ten second delay. Practically speaking then, a public figure could never recover from the broadcast of defamatory statements. It is difficult to understand how such a policy would advance legitimate First Amendment interests. While some members of this Court have espoused an unconditional and indefeasible immunity from liability for defamation, see *New York Times Co. v. Sullivan,* 376 U.S. at 293 (opinion of Black, J.); *Garrison v. Louisiana,* 379 U.S. 64, 80 (1964) (opinion of Douglas J.), a strong *majority* of the Court has determined not to embrace this principle. *E.g., Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 341 (1974).

Conclusion.

For the reasons identified herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. GOLDMAN,
MICHAEL D. QUINLAN,

GOLDMAN & CURTIS,
144 Merrimack Street,
Lowell, Massachusetts 01852.
(617) 454-8804
Attorneys for the Petitioner

Appendix A.

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC. *vs.* CENTRAL BROADCASTING CORPORATION.

Hampshire. October 5, 1979. — November 13, 1979.

Present: HENNESSEY, C.J., BRAUCHER, KAPLAN, WILKINS, & LIACOS, JJ.

Libel and Slander. ***Constitutional Law,*** Freedom of speech and press; Libel and slander. ***Practice, Civil,*** Appeal, Summary judgment.

CIVIL ACTION commenced in the Superior Court on September 2, 1977.

A motion for summary judgment was heard by *Moran,* J., a Distirct Court judge sitting under statutory authority.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct review.

Evan T. Lawson (*Howard J. Wayne* with him) for the defendant.

Robert H. Goldman (*Michael D. Quinlan* with him) for the plaintiff.

KAPLAN, J. National Association of Government Employees, Inc., is a labor union in the form of a nonprofit Delaware corporation, having a division known as the International Brotherhood of Police Officers with a Local No. 398 in the small town of Ware.[1] The union complained in Superior Court of an alleged libel — a charge of "communism" — made by or on behalf of the defendant Central Broadcasting Corporation, owner of radio station WARE, in the course of a talk show on February 17, 1977, conducted

[1] That the nonprofit character of the corporation did not deprive it of possible status as a libel plaintiff, see *Boston Nutrition Soc'y, Inc.* v. *Stare,* 342 Mass. 439, 442 (1961).

by Jacquelyne Murphy, an employee of the station. After the pleadings were completed by answer to an amended complaint, the defendant moved for summary judgment under Mass. R. Civ. P. 56, 365 Mass. 824 (1974), tendering the pleadings, the plaintiff's responses to the defendant's request for admissions, and affidavits of Murphy and Richard H. Vaughan, executive vice president of the defendant. On its part the plaintiff filed an affidavit of William G. Norton, then executive director of the International Brotherhood. A judge of the District Court serving by designation in the Superior Court denied the motion without opinion. The defendant applied to a single justice of the Appeals Court under G. L. c. 231, § 118, first paragraph, for relief from the order of denial, and the single justice granted relief by way of authorizing the defendant to pursue an appeal from the order in the Appeals Court. See *Foreign Auto Import, Inc.* v. *Renault Northeast, Inc.*, 367 Mass. 464, 470 (1975).[2] When the appeal was lodged in the Appeals Court, this court took it for direct review. We reverse. Judgment will enter for the defendant.

From the papers supporting and opposing the defendant's motion, the following appears without material dispute. For some time prior to January 25, 1977, the plaintiff on behalf of the town policemen was engaged in collective bargaining with the Ware board of selectmen consisting of three members. On that date a contract was executed between the International Brotherhood and the town. This

[2] See, however, the general policy disfavoring appeal from interlocutory orders such as one denying summary judgment. *Cappadona* v. *Riverside 400 Function Room, Inc.*, 372 Mass. 167, 169 (1977); *Kargman* v. *Superior Court*, 371 Mass. 324, 329-330 (1976); *Corbett* v. *Kargman*, 369 Mass. 971 (1976). Ordinarily such appeal is possible only on the basis of a report by the judge who made the order. G. L. c. 231, § 111.

had the approval of two selectmen, but was opposed by the third, Abraham Goodman, chairman of the board. The contract was contingent upon its being approved and funded by the town. That was to be decided by the citizens at a special town meeting called for February 22. Meanwhile officials and members of the plaintiff organization were attempting to persuade the public to vote affirmatively.

On February 2, Norton, as executive director of the International Brotherhood, wrote to Goodman in a tone of warning. Norton took the position that as a majority of the board of selectmen had approved a collective agreement, but Goodman had not, "you are prohibited from speaking against the contract, but most support it. . . . Any unlawful violation upon your part could result in enormous and needless outpouring of taxpayers' monies in legal action and possibly against you personally under Chapter 150E of the General Laws."[3]

On February 12, Norton addressed a letter to the Federal Communications Commission stating that "members of the Ware, Massachusetts Police Department have been complaining bitterly over radio station WARE's vocal vendetta against them in news items and on the station's talk show"; that the situation had become "anti-police" with "almost a daily and constant cacophony of police misinformation, unfounded allegations of police procedures and actions, deliberate distortions of facts." Two officials of the station, said Norton, had made a demand on the police department "to subvert the law" and "[f]ailure to comply . . . would bring about the molding of public opinion against a pending police contract, subversion of a governmental process (town

[3] The reference was to the statute on collective bargaining of public employees. Although the matter has no necessary bearing on the result in the present case, it may be pointed out that Norton's statement about Goodman's supposed legal obligation was exceedingly rash and ill-advised. See *Labor Relations Comm'n* v. *Selectmen of Dracut*, Mass. , - (1978) (Mass. Adv. Sh. [1978] 657, 663-665); *Boston Teachers Union, Local 66* v. *School Comm. of Boston*, 370 Mass. 455, 471-475 (1976); *Mendes* v. *Taunton*, 366 Mass. 109, 117-119 (1974).

meeting), interfere with a contractual agreement, and otherwise force certain police officers to compromise their oath of office." The letter concluded: "As representatives of the police in Ware, and acting from their demand, we respectfully request that the agency conduct a full-scale investigation and to determine if station WARE is fit to retain its license."

On February 16, the Ware River News, the local newspaper, published the text of the letter to the FCC, and, referring to the letter to Goodman, reported that "Goodman last week rejected the [International Brotherhood's] position as an infringement of his first amendment rights." It also reported Vaughan's comments. Vaughan said the station was providing unbiased news coverage for the area and a public forum through the talk show, and he pointed to a lack of specificity in the charges made to the FCC.

We come now to the utterances on the February 17 (Thursday) talk show, a program called "Sound Off," having the familiar format of members of the audience calling in and conversing with the announcer or host.[4] (In the following narrative, we italicize the words alleged in the complaint to constitute the libel: the complaint did not set out the rest of the colloquies on the program, nor did it provide the background of the letters and so forth.)[5] Goodman

[4] Station WARE had an electronic delay-abort system allowing the host of the program (or other monitoring station employee) ten seconds in which she could "scrub" a conversation from the air. For purposes of the present case, no particular importance need be attached to the presence of the electronic system. For those purposes we need not stress the fact that Murphy had little time for deliberation, a circumstance that has on occasion weighed in favor of a libel defendant (see *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 869-870 [1975]; *Priestley* v. *Hastings & Sons Publishing Co. of Lynn*, 360 Mass. 118, 123 [1971]), nor need we refer to the characterization of these talk programs as "the modern version of the town meeting in vogue earlier in our country's history." *Adams* v. *Frontier Broadcasting Co.*, 555 P.2d 556, 566 (Wyo. 1976).

[5] A judge of the Superior Court denied the defendant's motion to dismiss the bare amended complaint for failure to state a claim, Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). Thereafter the defendant filed its answer, and, supplying the full text of the program and the background material, moved for summary judgment.

called, identified himself, and said he was "very angry." "Why is that?" "*Because we're supposed to be living in a free and a democratic country and I don't think we are. This episode with the police union making demands on the station as well as myself, I want to go on record publicly that I will support the station a hundred percent.*" "*Thank you very much.*" "*Because, if we do not get together and stop the inroad of communism, something will happen.*" "*Well, I agree with everything you're saying . . ..*" Murphy went on to refer to an editorial in the newspaper (again February 16) severely critical of the union, and she said, "it's up to the Ware taxpayers . . . to handle the affairs of the Town . . . and that's what we elected you to do and if you can't speak . . .." Goodman broke in to ask all to come to the special town meeting and said he would ask for a secret ballot to avoid intimidation by the police department. He then discussed at some length the financial situation of the town in relation to the funding required for the police contract, and renewed his plea for full attendance at the special town meeting (as well as at the annual meeting in May). Murphy said, "[T]he only unfortunate part is and it's too bad that you as our Chief Executive won't be able to speak . . . at the special town meeting," but no one could be stopped from voting. Goodman said he understood that the attorney for the union would be present and ask to speak at the forthcoming meeting, and if the moderator allowed that intervention, he, Goodman, should be privileged to speak. Murphy agreed that if an outsider could talk, so should the chairman of the board of selectmen. Goodman reiterated that he should have the opportunity to speak, and Murphy agreed and hoped for a big turnout at the meeting. Goodman: "Well, I hope so. But, *again I want to say that if there is anything I can help the station towards fighting the inroads of communism which in this particular case is the union, police union, I will be glad to help.*"

Later in the program, an anonymous caller expressed resentment that Goodman had called the police department communist, when a main factor in a person's becoming an

officer is his concern about the country and the community, and the police department was doing a good job and Ware had a low crime rate. "Now, if his Department is Communist and he is the leader of this Department[6] then he's a Communist." Murphy said: "Mr. Goodman did not say anything about the Police Department being Communist. What he said was the infringement upon a basic American Democratic right, and that is the right to free speech, is being infringed upon by this union, this International Union or Brotherhood of Police Officers that is coming in, and first of all telling the Chairman of the Board of Selectmen, an elected official of the taxpayers, that he cannot speak, and secondly, is now saying that the radio station, which is licensed to serve community needs is not doing that and is now on a, I believe the word is, vocal vendetta . . .. However, as far as Mr. Goodman saying anything about the Police Department being Communist, you're incorrect. What he was saying is that this union is attempting to subvert the right to free speech . . .."[7]

The following three independent but converging lines of authority demonstrate that the defendant was entitled to summary judgment.

1. *Opinion on disclosed or assumed facts.* For purposes of the point now to be made, we indulge the assumption that the statement of opinion embodied in the word communism could carry a libelous meaning or connotation, and that the opinion was attributable to the defendant through adoption by its employee. Still on the record there was no genuine issue for trial. This was because the facts basing the opinion were apparent and disclosed (and it is not con-

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[6] By virtue of his office as chairman of the board of selectmen.

[7] After a telephone conversation on February 17 with Henry Gagnon, president of Local No. 398, Vaughan wrote to Gagnon on February 18 that he was making the talk show available to Gagnon's group on February 21 (Monday). This offer was refused by letter of February 19 from "Membership Ware Local 398 I.B.P.O."

The special town meeting on February 22 voted against funding the contract.

tended that they were themselves libelous; in any event, they were truly stated or referred to). Those facts were that the plaintiff union had warned Goodman against speaking adversely at the town meeting — the substance of the letter of February 2; and had sought an FCC investigation of the defendant's right to retain its station license (which might make the station wary of criticizing the union) — the letter of February 12. Murphy's statement at the end of the broadcast pointed to these facts and gave her opinion, in effect, that they amounted to an attempt to subvert free speech (and in that sense resembled communist tactics). In the light of the facts, hearers could make up their own minds and generate their own opinions or ideas which might or might not accord with Murphy's. These circumstances remove the case from the category of actionable defamation, no matter how invidious or derogatory the expression "communism" is conceived to be. In a larger view, a state of affairs in which opinion is recognizable as such because its factual ingredient is known or assumed, presents a clear case for full First Amendment protection including freedom from civil liability.

"We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974) (footnote omitted). From these principles, with their constitutional roots, the American Law Institute derived § 566 of Restatement (Second) of Torts (1977): "*Expressions of Opinion*. A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." The matter is put thus in Comment *c*, second par.: "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjus-

tified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently."[8] Thus if I write, without more, that a person is an alcoholic, I may well have committed a libel prima facie; but it is otherwise if I write that I saw the person take a martini at lunch and accordingly state he is an alcoholic. See Illustrations 3 and 4 to § 566. The rule and the distinction are confirmed by the recent cases. See *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 282-287 (1974); *Greenbelt Coop. Publishing Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970); *Orr* v. *Argus-Press Co.*, 586 F.2d 1108, 1114-1115 (6th Cir. 1978), cert. denied, U.S. (1979);[a] *Edwards* v. *National Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir.), cert. denied sub nom. *Edwards* v. *New York Times Co.*, 434 U.S. 1002 (1977); *Hotchner* v. *Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), cert. denied sub nom. *Hotchner* v. *Doubleday & Co.*, 434 U.S. 834 (1977); *Hoover* v. *Peerless Publications, Inc.*, 461 F. Supp. 1206, 1209-1210 (E.D. Pa. 1978); *Mashburn* v. *Collin*, 355 So. 2d 879, 884-885 (La. 1977); *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 380-381 (1977); *Wehringer* v. *Newman*, 60 App. Div. 2d 385, 390

[8] The evolution of new § 566 is traced in Christie, Defamatory Opinions and the Restatement (Second) of Torts, 75 Mich. L. Rev. 1621 (1977). Under old § 566, a derogatory expression of opinion, although based on disclosed or assumed facts, could be actionable. New § 566 is to the contrary. Its text engrosses and renders unnecessary anything on the order of old § 567 as to expressions of opinion on undisclosed facts, and also supersedes old §§ 606-607 regarding fair comment. Accordingly the three sections were eliminated. Note the statements in *Orr* v. *Argus-Press Co.*, 586 F.2d 1108, 1113-1114, 1115-1117 (6th Cir. 1978), and *Mashburn* v. *Collin*, 355 So. 2d 879, 882-883 (La. 1977), about the relation of the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to preexisting doctrine concerning fair comment. Cf. *Hartmann* v. *Boston Herald-Traveler Corp.*, 323 Mass. 56 (1948).

[a] 99 S. Ct. 1502 (1979).

(N.Y. 1978).[9] If there should be any doubt about the sweep of the reasoning as applied to what may be termed private libels, there can, we think, be none in cases like the present where we have a public communication directed to a "public figure" (delineated below) on a matter of public concern. See § 566, Comment *c*, par. 1.

2. *Too amorphous a characterization to be actionable.* Point 1 holds firm, as we have noted, on the assumption that the label communism is libelous. But that assumption becomes threadbare when setting and meaning are further explored.

The word was used in the midst of a public debate looking to a town meeting where sides would have to be taken. The subject was a labor contract said to be sponsored by an "outside" union and to threaten to add to the tax rate. This was an occasion on which voices could be expected to be raised in sloganeering invective. (The plaintiff's letter of February 12 is an example.) The target public, whose votes were being solicited, would be particularly critical and skeptical of hyperbolic statements from any source, as they notoriously are toward election oratory. Cf. *Poland* v. *Post Publishing Co.*, 330 Mass. 701, 704 (1953); *Aldrich* v. *Boyle*, 328 Mass. 30, 32 (1951); *Twohig* v. *Boston Herald-Traveler Corp.*, 346 Mass. 654, 656 (1964) (Cutter, J., dissenting).[10]

Of course Goodman did not mean to charge the plaintiff with complicity in the atrocities of Solzhenitsyn's Gulag Archipelago or other horrors distinctive of a totalitarian regime. No group in the community after even brief reflection would understand Goodman to be making such a charge. Against the background, "communism" would

[9] For example, in *Greenbelt*, *supra*, the "simple expression of opinion" (§ 566, Comment *c*, second par.) that the plaintiff was engaged in "blackmail" could not ground a libel action in the light of the disclosed facts; in *Letter Carriers*, *supra*, the same applied to the charge "scab" as amplified by the violently vituperative definition of that term by the novelist Jack London circulated by the plaintiff letter carriers' union.

[10] Another appearance of the *Twohig* case is at 362 Mass. 807 (1973).

most likely be taken by the audience as mere perjorative rhetoric, abusive of the plaintiff for what it had done or appeared to have done in attempting to squelch criticism. In this there would be no libel. Restatement (Second) of Torts § 566, Comment *e* (1977).

If the word carried some further meaning or overtone (which is very doubtful), it was too vague to be cognizable as the subject of a defamation action. Our case in this respect resembles or perhaps is stronger for the defendant than *Buckley* v. *Littell*, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977), where the title of fellow traveler of fascism (or variants), applied to the publicist William F. Buckley, Jr., in a context of mutual ideological recriminations, was held to have "tremendous imprecision" and to be too "loosely definable," too "variously interpretable," to be considered actionable as a defamation. *Id.* at 893, 895. Incidentally, the court noted a possible difference between the vague expression there at bar and a specific charge of association with "the Fascisti, or the Nazis, or the Falangists, or a mythical Fascist Party of America" (*id.* at 893-894, n.11); so also a possible difference between attacking a person for "communism," and charging him specifically with being "a member of the Communist Party, or a legislative representative of the Communist Party." *Id.* at 894. The Supreme Court of the United States would consider an undifferentiated cry of "fascist" in the course of a labor-management dispute as an unamiable but nonlibelous utterance (see *Letter Carriers*, *supra*, 418 U.S. at 284; cf. *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 [1966]); and we can be sure that "communist" would fare the same. In like manner, common sense repels any suggestion that there was a charge worthy or indeed capable of trial in the present situation. "An assertion that cannot be proved false cannot be held libelous." *Hotchner*, *supra*, 551 F.2d at 913.

[11] The point may be made by trying to imagine, after reading his interposition on the "Sound Off" program, how the anonymous caller would have attempted to define communism.

3. *No genuine issue as to "knowledge of falsity" or "reckless disregard."* Assuming an otherwise actionable defamation, its object here was a "public figure" within the meaning of the *Gertz* case, *supra*, 418 U.S. at 351,[12] so that the plaintiff had the ultimate burden of proving that the defendant's representative adopted Goodman's statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964). And the plaintiff's proof on the point must be "clear and convincing" (*Gertz*, *supra*, 418 U.S. at 342), as that heavy measure was described by us in *Callahan* v. *Westinghouse Broadcasting Co.*, 372 Mass. 582, 587-588 (1977).

To support a motion for summary judgment, the defendant was required to establish that on the evidence brought forward, considered with an indulgence in the plaintiff's favor, a jury could not reasonably conclude that the plaintiff had shouldered and carried the burden above mentioned. See the extensive discussion in *Nader* v. *deToledano*, A.2d (Ct. App. D.C. 1979).[b 13] As "knowl-

[12] If not an all-purpose public figure, this public-employee union was surely a public figure of limited range as matter of law: "That designation [public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." *Gertz*, *supra* 418 U.S. at 351. See *Stone*, *supra*, 367 Mass. at 865-867; Annot., 75 A.L.R.3d 616 (1977). We may note, also, that the present case involves collaterally but nevertheless significantly the right of expression of Goodman as a public official.

[b] 5 Media L. Rep. 1550 (July 31, 1979).

[13] In the *Nader* case the court points out that according to one approach to summary judgment motions in "public official" or "public figure" defamation cases, the defendant is held to less than the customary demanding standard because of First Amendment considerations. See, e.g., *Wasserman* v. *Time, Inc.*, 424 F.2d 920 (D.C. Cir.), cert. denied, 398 U.S. 940 (1970). Without attempting to decide whether any such relaxation is justifiable, we are applying in the present case the usual standard for summary judgment as set out in our text.

edge" or "reckless disregard" is a subjective matter, a question of state of mind, quite distinct from any question of objective reasonableness or prudence (see *St. Amant* v. *Thompson*, 390 U.S. 727, 731 [1968]), the Supreme Court doubted a statement by a lower court that decision on motion for summary judgment should be "the rule rather than the exception." *Hutchinson* v. *Proxmire*, U.S. , & n.9 (1979).[c] But "that does not mean that a party against whom summary judgment is sought is entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim." *Hahn* v. *Sargent*, 523 F.2d 461, 468 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976).[14]

Here Murphy's statement at the close of the broadcast describes her state of mind: she understood Goodman to be attacking the plaintiff for trying to stifle criticism of the labor contract. It is not to be overlooked that her statement was made substantially contemporaneously with the alleged libel. Cf. *Walsh* v. *Wyman Lunch Co.*, 244 Mass. 407, 409 (1923). Murphy's affidavit is in the same vein.[15] Both avowals are impressive and in the milieu of the case tend strongly to indicate that on the part of the defendant there was no question of knowing falsehood or reckless indifference to falsity. The plaintiff produced an affidavit of Norton asserting that the defendant was hostile toward the

[c] 47 U.S.L.W. 4827, 4830 & n.9 (June 26, 1979).

[14] From the *Nader* case, *supra*, A.2d at n.5, n.7 (5 Media L. Rep. at 1556 n.5, 1558 n.7) we learn that in the large majority of cases where a public official or public figure has been held to be involved, proof of "knowledge" or "reckless disregard" has failed, and in many cases the disposition has come on summary judgment.

[15] In her affidavit Murphy, after setting out her understanding of Goodman's remarks, says frankly, and as showing further that she had no guilty state of mind, that she did not at the time of the broadcast consider whether there might be some listeners who would understand Goodman's remarks as a charge of actual espousal of communism, or whether the plaintiff's organization might in fact be connected with communism.

plaintiff and working against it. But it has been repeatedly observed that that does not approach a showing of the mordant unconcern with the truth of the particular statement which is crucial to the claim of defamation by a public figure. See *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 251-252 (1974); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 82 (1967).[16] Conspicuously lacking from the Norton affidavit are any of the usual bases for inferring the guilty state of mind: "[A] story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. . . . [T]he publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. . . . [T]here are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St Amant*, *supra*, 390 U.S. at 732. We note finally that the plaintiff, having available to it the instruments of pretrial discovery to seek out proof of the crucial state of mind (see *Herbert* v. *Lando*, U.S. [1979]),[d] made no effort, so far as appears, to depose Murphy or others who might have information. On the record as we have it, there is no issue for a jury as to one or more material facts.

To conclude, it appears that our result is compelled by doctrines deriving ultimately from the First Amendment as interpreted by the Supreme Court;[17] but, were it not constitutionally required, we would reach the same result, believing that the action is plainly without merit and the prospect

[16] Indeed it is at this point that the current law departs from the earlier qualified privilege of fair comment.

[d] 47 U.S.L.W. 4401 (April 18, 1979).

[17] We observe that the older defamation cases based on attribution to plaintiffs of unpopular political or social beliefs must be reexamined in light of the doctrines considered in the present opinion which reflect constitutional developments since the *New York Times* case. A prevision of the constitutional problems appears in Judge Charles E. Clark's dissent in *Sweeney* v. *Schnectady Union Publishing Co.*, 122 F.2d 288, 290 (2d Cir. 1941), aff'd by equally divided court, 316 U.S. 642 (1942).

of forcing the defendant to trial in such a case would put an unjustified and serious damper on freedom of expression.[18]

Order reversed.
Judgment for defendant.

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[18] The plaintiff in its complaint alleged damages of $3,000,000 — a claim of compensatory damages in that amount, since punitive damages "in any defamation action" were outlawed by us in the *Stone* case (367 Mass. at 860). This was a not inconsiderable contingent liability for a small radio station to have to note on its financial statements. A question is raised whether such an averment as to damages squares with Mass. R. Civ. P. 11 (a), 365 Mass. 753 (1974), providing in part that "[t]he signature of an attorney to a pleading constitutes a certificate by him . . . that to the best of his knowledge, information, and belief there is a good ground to support it. . . ."

16397

COMMONWEALTH OF MASSACHUSETTS.
Supreme Judicial Court
for the Commonwealth,
at Boston, November 13, 1979.
In the case no. SJC-1883

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.

vs.

CENTRAL BROADCASTING CORPORATION

pending in the Superior Court for the County of Hampshire No. 16397

Ordered, that the following entry be made in the docket: viz., —

Order reversed.
Judgment for defendant.
By the Court,
/s/ Frederick J. Quinlan, Clerk.

Nov 13, 1979
See opinion on file.

[stamp]

Appendix B.

Docket Entries.

HAMPSHIRE, SS. SUPERIOR COURT, CIVIL **16397**

National Association of Government Employees Inc., d/b/a International Brotherhood of Police Officers vs. Central Broadcasting Corporation and ~~Abraham Goodman~~

JURY

Counsel for Plaintiff	Counsel for Defendant
(617-454-8804)	(617-791-3511) 01608
Goldman, Curtis, Adams & Bell, 8 Merrimack St., Lowell 01852	Bowditch & Dewey, 311 Main St., Worcester
	(617-542-4010)
	Lawson & Wayne, 100 Federal St., Boston 02110

ACTION OF OTHER TORT

1977 September 2	(1) Complaint and jury claim.
" " 22	(2) Stipulation extending time for defendant, Abraham Goodman, to answer. (to & including October 26, 1977)

"	"	"	(3) Stipulation extending time for defendant, Central Broadcasting Corporation, to answer. (to & including October 26, 1977)
"	October	14	(4) Amended complaint and plaintiff's jury claim.
"	"	25	(5) Stipulation extending time for defendant, Abraham Goodman, to answer. (to & including November 15, 1977)
"	"	"	(6) Stipulation extending time for defendant, Central Broadcasting Corporation, to answer. (to & including November 15, 1977)
"	November	2	(7) Motion of defendant, Central Broadcasting Corporation, to dismiss.
"	"	15	(8) Stipulation extending time for defendant, Abraham Goodman, to answer. (to & including December 15, 1977)
"	December	19	(9) Stipulation extending time for defendant, Abraham Goodman, to answer. (to & including January 10, 1978)
1978	January	3	(10) Plaintiff's statement of damages, as to defendant, Central Broadcasting Corporation.
"	"	13	(11) Stipulation extending time for defendant, Abraham Goodham [sic] , to answer. (to & including January 25, 1978)
"	"	"	(12) Plaintiff's motion for order dropping defendant, Abraham Goodman, filed, with assent of defendants' attorneys.
"	Jan.Sp.Sit.	27	Plaintiff's motion for order dropping defendant, Abraham Goodman, allowed. (Greaney, J.)
"	"	"	Notice of above action mailed to counsel of record.
1978	Feb.Sit.	16	(13) Finding on defendant's motion to dismiss. (Greaney, J.)

"	"	"	Motion of defendant, Central Broadcasting Corporation, to dismiss denied. (Greaney, J.)
"	"	17	Notice of above action mailed to counsel of record.
"	April	3	(14) Defendant's answer to amended complaint.
"	"	"	(15) Defendant's requests for admissions pursuant to Rule 36.
"	May	2	(16) Plaintiff's motion for extension of time for answering or objection to defendant's request for admissions filed, with assent of defendant's attorney. (to & including June 2, 1978)
"	"	23	(17) Plaintiff's response to defendant's request for admissions pursuant to Rule 36.
"	June	12	(18) Defendant's motion for summary judgment and affidavit
"	September	7	(19) Affidavit of William C. Norton.
"	"	12	(20) Appearance of David A. Wojcik, Esquire, for defendant.
"	Sept.Sit.	"	Defendant's motion for summary judgment denied. (Moran, D.C.J.)
"	"	"	Notice of above action mailed to counsel of record.
"	October	11	(21) Notice of defendant's appeal. (from denial of motion for summary judgment)
"	"	"	Copy of above notice mailed to counsel of record.
"	December	29	(22) Attested copy of Appeals Court Order by Armstrong, J. Copies mailed to counsel of record.
1979	January	9	(23) Notice of defendant's appeal. (from denial of motion for summary judgment by Moran, D.C.J.) (filed by Messrs. Bowditch & Dewey)

"	"	"	Copy of above notice mailed to counsel of record.
"	"	11	(24) Appearance of Messrs. Lawson and Wayne for defendant.
"	"	"	(25) Notice of defendant's appeal. (from denial of motion for summary judgment by Moran, D.C.J.) (filed by Messrs. Lawson and Wayne)
"	"	"	Copy of above notice mailed to counsel of record.
"	"	"	(26) Notice of assembly of record on appeal in accordance with Appellate Rule 9(d).
"	"	"	Copy of above notice mailed to counsel of record and to Clerk of Appeals Court.
"	Feb.Sit.	22	(27) Defendant's motion for release of documents filed, and allowed. (Cross, J.)
"	"	"	" Notice of above action mailed to counsel of record and original file mailed, certified mail, to printer Addison C. Getchell & Son, Inc.

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, SS. SUPERIOR COURT
NO.

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., d/b/a INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS,	Plaintiff
vs.	COMPLAINT
CENTRAL BROADCASTING CORPORATION, AND ABRAHAM GOODMAN,	Defendants

1. The Plaintiff, National Association of Government Employees, Inc., is a foreign corporation duly organized by the laws of Delaware as a non-profit corporation with a principal office in Boston, Massachusetts, and is a labor union with a division known as International Brotherhood of Police Officers, which together with the said division has been and is enjoying a good reputation among its members and the public and among members of the union movement in the Commonwealth of Massachusetts and throughout the United States generally, as a union of police officers and other government employees that is reputable, devoted to the interests of its members, patriotic, honest and carrying on its activities in accordance with law.

2. The Defendant, Central Broadcasting Corporation, is a corporation duly organized by law with a principal place of business in the Town of Ware, Hampshire County, Massachusetts and operates radio station WARE in said Town of Ware.

3. The Defendant, Abraham Goodman, is a member of the Board of Selectman of the Town of Ware, Hampshire County, Massachusetts, and resides in said town.

COUNT I

4. By means of a radio broadcast on or about February 17, 1977, the Defendant, Central Broadcasting Corporation, on its "Sound-Off Program" wherein one Abraham Goodman was heard by the public at large, printed and published of and concerning the Plaintiff: [Goodman] "Because we are supposed to be living in a free and democratic country and I don't think we are. This episode with the Police Union making demands on the station as well as myself. I want to go on record publicly that I will support the station 100 percent . . . Again I want to say that if there is anything I can help this station towards fighting the inroads of Communism which in this particular case is the union, Police Union, I would be glad to help," meaning by the words "Police Union" and "Union" the Plaintiff and its said division, International Brotherhood of Police Officers.

5. Said broadcast being a false, wicked, malicious, scandalous and defamatory libel of and concerning the said Plaintiff.

6. The said words spoken on the radio station were simultaneously transcribed and contained in a script or a tape made by and at the radio station.

7. That the Defendant, Central Broadcasting Corporation, in so broadcasting to the public at large in said Town of Ware and elsewhere knew all of the allegations made as to the

Plaintiff were false, and was so acting with a reckless disregard of the facts and the truth and was acting negligently and was thus, knowingly, falsely and recklessly and carelessly meaning and intending to convey and actually conveying the meaning that the Plaintiff was an organization infiltrated by Communists and containing members of the Communist party and was carrying out the principles of the Communist party and of Communism both as to the union and police union movement generally and in the Town of Ware in particular, and was endeavoring to make inroads into the town government of Ware, and generally throughout the Commonwealth of Massachusetts.

8. That the said broadcast was of a nature whose substance made substantial danger to the Plaintiff's reputation apparent and was meant to and did directly injure Plaintiff in its trade and business and profession as a labor union composed of police officers.

9. That by reason of said broadcast by the Defendant, Central Broadcasting Corporation, as aforesaid, the Plaintiff has been greatly injured by the broadcast in its reputation as a labor union of police officers and other government employees and otherwise and has been brought into great public scandal, ridicule, contempt and hatred and has suffered actual damage in the amount of Three Million Dollars.

COUNT II

10. By means of a radio broadcast by radio station WARE located in the Town of Ware in said Commonwealth on its "Sound-Off Program" in said Ware, heard by the public at large, the Defendant, Abraham Goodman, printed and published of and concerning the Plaintiff: [Goodman] "Because we are supposed to be living in a free and democratic country and I don't think we are. This episode with the Police Union making demands on the station as well

as myself. I want to go on record publicly that I will support the station 100 percent . . . Again I want to say that if there is anythink [sic] I can help this station towards fighting the inroads of Communism which in this particular case is the union, Police Union, I would be glad to help" meaning by the words "Police Union" and "Union" the Plaintiff and its said division, International Brotherhood of Police Officers.

11. The said words spoken on the said radio station were simultaneously transcribed and contained in a script or a tape made by and at the radio station.

12. The said broadcast being a false, wicked, malicious, scandalous and defamatory libel of and concerning the said Plaintiff.

13. The said words spoken by the Defendant, Abraham Goodman, on the radio station were simultaneously transcribed and contained in a script or a tape made by and at the radio station.

14. That the Defendant, Abraham Goodman in so broadcasting to the public at large, knew all of the allegations made as to the Plaintiff were false, and was so acting with a reckless disregard of the facts and the truth and was acting negligently and was thus, knowingly, falsely and recklessly and carelessly meaning and intending to convey and actually conveying the meaning that the Plaintiff was an organization infiltrated by Communists and containing members of the Communist party and was carrying out the principles of the Communist party and of Communism both as to the union and police union movement generally and in the Town of Ware in particular, and was endeavoring to make inroads into the town government of Ware, and generally throughout the Commonwealth of Massachusetts.

15. That the said broadcast was of a nature whose substance made substantial danger to the Plaintiff's reputation apparent and was meant to and did directly injure Plaintiff in its trade and business and profession as a labor union.

16. That by reason of said broadcast by the Defendant, Abraham Goodman, as aforesaid, the Plaintiff has been greatly injured by the broadcast in its reputation as a labor union of police officers and other government employees and otherwise and has been brought into great public scandal, ridicule, contempt and hatred and has suffered actual damage in the amount of Three Million Dollars.

COUNT III

17. By means of a radio broadcast on or about February 17, 1977, the Defendant, Central Broadcasting Corporation, on its "Sound-Off Program" wherein one Abraham Goodman was heard by the public at large, spoke and published of and concerning the Plaintiff: [Goodman] "Because we are supposed to be living in a free and democratic country and I don't think we are. This episode with the Police Union making demands on the station as well as myself. I want to go on record publicly that I will support the station 100 percent . . . Again, I want to say that if there is anything I can help this station towards fighting the inroads of Communism which in this particular case is the union, Police Union, I would be glad to help", meaning by the words "Police Union" and "Union" the Plaintiff and its said division, International Brotherhood of Police Officers.

18. Said broadcast being a false, wicked, malicious, scandalous and defamatory slander of and concerning the said Plaintiff.

19. The said words spoken on the radio station were simultaneously transcribed and contained in a script or a tape made by and at the radio station.

20. That the Defendant, Central Broadcasting Corporation, in so broadcasting to the public at large in said Town of Ware and elsewhere, knew all of the allegations made as to the Plaintiff were false, and was so acting with a reckless dis-

regard of the facts and the truth and was acting negligently and was thus, knowingly, falsely and recklessly and carelessly meaning and intending to convey and actually conveying the meaning that the Plaintiff was an organization infiltrated by Communists and containing members of the Communist party and was carrying out the principles of the Communist party and of Communism both as to the union and police union movement generally and in the Town of Ware in particular, and was endeavoring to make inroads into the town government of Ware, and generally throughout the Commonwealth of Massachusetts.

21. That the said broadcast was slander *per se,* and of a nature whose substance made substantial danger to the Plaintiff's reputation apparent and was of a nature to and was meant to and did directly injure Plaintiff in its trade and business and profession as a labor union of police officers and other government employees.

22. That by reason of said broadcast by the Defendant as aforesaid that Plaintiff has been greatly injured by the broadcast in its reputation as a labor union of police officers and otherwise has been brought into great public scandal, ridicule, contempt and hatred and has suffered actual damage in the amount of Two Million Dollars and suffered Special Damages as follows: The union suffered the loss of contracts with the said Town of Ware and with other cities and towns which otherwise would have been entered into and was forced to enter into contracts with the said town and with other cities and towns on more unfavorable terms all as a direct and proximate result of the said broadcast by the Defendant and the union suffered the loss of members and potential members as a result of the said broadcast by the Defendant, in the amount of One Million Dollars.

COUNT IV

23. By means of a radio broadcast by radio station WARE located in said Town of Ware on its "Sound-Off Program" in said Ware, heard by the public at large, in said Town of Ware and elsewhere, the Defendant, Abraham Goodman, spoke and published of and concerning the Plaintiff: [Goodman] "Because we are supposed to be living in a free and democratic country and I don't think we are. This episode with the Police Union making demands on the station as well as myself. I want to go on record publicly that I will support the station 100 percent . . . Again I want to say that if there is anything I can help this station towards fighting the inroads of Communism which in this particular case is the union, Police Union, I would be glad to help," meaning by the words "Police Union" and "Union" the Plaintiff and its said division, International Brotherhood of Police Officers.

24. The said words spoken on the radio station were simultaneously transcribed and contained in a script or a tape made by and at the radio station.

25. The said broadcast being a false, wicked, malicious, scandalous and defamatory slander of and concerning the said Plaintiff.

26. The said words spoken by the Defendant, Abraham Goodman, on the radio station were simultaneously transcribed and contained in a script or a tape at the radio station.

27. That the Defendant, Abraham Goodman in so broadcasting to the public at large, knew all of the allegations made as to the Plaintiff were false, and was so acting with a reckless disregard of the facts and the truth and was acting negligently and was thus, knowingly, falsely and recklessly and carelessly meaning and intending to convey and actually conveying the meaning that the Plaintiff was an organization infiltrated by Communist and containing members of the

Communist party and was carrying out the principles of the Communist party and of Communism both as to the union and police union movement generally and in the Town of Ware in particular, and was endeavoring to make inroads into the town government of Ware, and generally throughout the Commonwealth of Massachusetts.

28. That the said broadcast was slander *per se* and of a nature whose substance made substantial danger to the Plaintiff's reputation apparent and was of a nature to and was meant to and did directly injure Plaintiff in its trade and business and profession as a labor union of police officers and other government employees.

29. That by reason of said broadcast by the Defendant, Abraham Goodman, the Plaintiff has been greatly injured by the broadcast in its reputation as a labor union of police officers and otherwise has been brought into great public scandal, ridicule, contempt and hatred and has suffered actual damage in the amount of Two Million Dollars and Special Damages as follows: The union suffered the loss of contracts with the said Town of Ware and with other cities and towns which otherwise would have been entered into and was forced to enter into contracts with the said town and with other cities and towns on more unfavorable terms all as a direct and proximate result of the said broadcast by the Defendant and the union suffered the loss of members and potential members as a result of the said broadcast by the Defendant, in the amount of One Million Dollars.

The Plaintiff demands trial by jury.

WHEREFOR, plaintiff demands judgment on each count against the defendant in the amount of Three Million Dollars, plus costs and interest.

GOLDMAN, CURTIS, ADAMS
& BELL
Attorneys for the Plaintiff

/s/ Robert H. Goldman

Robert H. Goldman
8 Merrimack Street
Lowell, Mass. 01852
(617) 454-8804

Hampshire SS Superior Court
Filed Sep 2 1977
/s/ Salvatore A. Polito, Clerk

4.

COMMONWEALTH OF MASSACHUSETTS.

HAMPSHIRE, ss. SUPERIOR COURT
CIVIL ACTION
NO. 16397

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., d/b/a INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS,
Plaintiff

vs.

CENTRAL BROADCASTING CORPORATION, AND ABRAHAM GOODMAN,
Defendants

AMENDED COMPLAINT

Now comes the Plaintiff in the above-entitled action and amends its Complaint, as of course before any responsive pleading has been served in accordance with the provisions of Rule 15 (a), Massachusetts Rules of Civil Procedure, in the following respects:

1. By inserting in each of Counts I, II, III and IV Paragraphs 4, 10, 17 and 23 respectively, after the words "of and concerning the Plaintiff:" in each of said paragraphs the following sentences to the end of each of said paragraph:

> [Goodman] "Because we are supposed to be living in a free and democratic country and I don't think we are.

> This episode with the Police Union making demands on the station as well as myself. I want to go on record publicly that I will support the station 100 percent."
> [Station WARE Announcer] "Thank you very much."
> [Goodman] "Because if we do not get together and stop the inroad of communism something will happen."
> [Station WARE Announcer] "Well I agree with everything you are saying." . . .
> [Goodman] "Again I want to say that if there is anything I can help this station towards fighting the inroads of Communism which in this particular case is the union, Police Union, I would be glad to help,"

meaning by the words "Police Union" and "Union" the Plaintiff and its said division, International Brotherhood of Police Officers.

2. By inserting in each of Counts I, II, III and IV, Paragraphs 7, 14, 20 and 27 respectively, after the last word in each of said paragraphs the following sentence:

> —"And further, knowingly, falsely and recklessly and carelessly meaning and intending to convey and actually conveying the meaning that the Plaintiff favors and is acting to bring about in Ware, in Massachusetts and throughout the United States and in the union movement in all of the said places a form of government that is a dictatorship and which is dictated to the suppression of civil rights and basic human rights and liverties [sic]."

3. By inserting at the end of each of Counts I, II, III and IV the following sentence:

> —"WHEREFORE, Plaintiff demands judgment against the Defendant on this Count in the amount of Three Million Dollars, plus costs and interest."

4. Except as hereinabove stated, the Original Complaint herein is hereby incorporated by reference as if set forth in full herein.

The Plaintiff demands trial by Jury.

GOLDMAN & CURTIS
Attorneys for the Plaintiff

/s/ Robert H. Goldman

Robert H. Goldman
8 Merrimack Street
Lowell, Mass. 01852
(617) 454-8804

Hampshire SS Superior Court
Filed Oct 14 1977
/s/ Salvatore A. Polito, Clerk

COMMONWEALTH OF MASSACHUSETTS.

HAMPSHIRE, SS. SUPERIOR COURT
NO. 16397

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., d/b/a INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, Plaintiff vs. CENTRAL BROADCASTING CORPORATION, AND ABRAHAM GOODMAN, Defendants	MOTION TO DISMISS

The defendant CENTRAL BROADCASTING CORPORATION moves this court, under Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure, to dismiss the action on the ground that the complaint fails to state a claim against the defendant CENTRAL BROADCASTING CORPORATION upon which relief can be granted, in that

1. The words complained of in paragraphs 4, 10, 17, and 23 of the complaint are not reasonably capable of any defamatory meaning; and

2. Even if the words complained of in paragraphs 4, 10, 17 and 23 of the complaint could be reasonably capable of any defamatory meaning when spoken in reference to a natural

person, they cannot as a matter of law defame a corporation because they are not reasonably capable of any meaning which would imply mismanagement, fraud or financial instability; and

3. Count I of the complaint, alleging libel against the defendant CENTRAL BROADCASTING CORPORATION, fails to allege publication of any printed matter.

CENTRAL BROADCASTING CORPORATION

By its attorney

/s/ Michael P. Angelini

Michael P. Angelini
Bowditch & Dewey
311 Main Street
Worcester, MA 01608
Tel. (617) 791-3511

Dated: November 1, 1977

NOTICE OF MOTION

TO: Robert H. Goldman, Esq.
GOLDMAN & CURTIS
Eight Merrimack Street
Lowell, MA 01852
(617) 454-8804

Please take notice that the undersigned will bring the above Motion on for hearing before this Court on Friday,

November 18, 1977, at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ Michael P. Angelini

Michael P. Angelini

See letter dated 11-21-77 remarking for 2/15/78

Hampshire SS Superior Court
Filed Nov 2 1977
/s/ Salvatore A. Polito, Clerk

2/16/78—After hearing, motion denied (see #13). By the Court (Greaney, J.) Attest: /s/ Norma J. Thibodo, Asst. Clerk

12.

COMMONWEALTH OF MASSACHUSETTS.

HAMPSHIRE, SS. SUPERIOR COURT
CIVIL ACTION
NO. 16397

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., d/b/a INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, Plaintiff	MOTION FOR ORDER DROPPING DEFENDANT ABRAHAM GOODMAN
v.	
CENTRAL BROADCASTING CORPORATION, AND ABRAHAM GOODMAN, Defendants	

Plaintiff moves the court pursuant to Rule 21, Massachusetts Rules of Civil Procedure, for an order dropping only Defendant, Abraham Goodman, as a Defendant in the captioned matter.

GOLDMAN & CURTIS,
Attorneys for the Plaintiff

/s/ Robert H. Goldman

Robert H. Goldman
8 Merrimack Street
Lowell, Massachusetts 01852
(617) 454-8804

ASSENTED TO:
/s/ David A. Wojcik

David A. Wojcik,
Attorney for Abraham Goodman
Bowditch & Dewey
311 Main Street
Worcester, Massachusetts 01608

/s/ Michael P. Angelini

Michael P. Angelini,
Attorney for Central Broadcasting Corporation
Bowditch & Dewey
311 Main Street
Worcester, Massachusetts 01608

Hampshire SS Superior Court
Filed Jan 24 1978
/s/ Salvatore A. Polito, Clerk

Hampshire ss.
January 27, 1978

After hearing, the within Motion is hereby ALLOWED.
By the court, Greaney, J.
Attest: /s/ Salvatore A. Polito, Clerk

13.

COMMONWEALTH OF MASSACHUSETTS.

Hampshire, ss. Superior Court
Civil Action
No. 16397

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., d/b/a

v.

CENTRAL BROADCASTING CORPORATION, et al

FINDING ON DEFENDANT'S MOTION TO DISMISS

****

After hearing, and consideration of the pleadings and briefs, the Motion to Dismiss is DENIED.

The defendant raises three grounds as warranting dismissal of the complaint.

With regard to the defendant's first argument that the words complained of in the amended complaint as libelous are not defamatory, I find that the language with innuendoes capable of being drawn therefrom are reasonable [sic] susceptible of a defamatory meaning. The defendant concedes for purposes of this motion that a defamatory statement made by a caller to a talk show on a radio station broadcasting to the general public can be actionable without any further action on the part of the personnel of the station by way of adoption of the statement or otherwise. The statements attributed to the caller to the station (one Goodman), in particular the

statement "... I can help this station towards fighting the inroads of Communism which in this particular case is the union, Police Union, I would be glad to help" are reasonably capable of being inferred as accusing the plaintiff union of having Communistic membership, and making attempts to advance the goals and philosophy of Communism. There are ample cases holding that such an accusation is defamatory.

See, *Jaworsky v. Padifield,* 211 So. 2d 122; *McGraw v. Webster,* 440 P2d 296; *MacLeod v. Tribune Pub. Co.* 343 P2d, 26; *Farm Bureau Federation v. National Farmers Union Service Corp.* 198 F. 2d, 20; *Grant v. Readers Digest Assoc., Inc.* 151 F. 2d, 733.

The defendant also cites and relies on the case of *Grande & Son, Inc. v. Chase,* 333 Mass. 166 (1955) as holding that the words complained of here are not defamatory when applied to a corporate plaintiff because they are not reasonably capable of any meaning which would imply mismanagement, fraud, or financial instability to the union. More in point as to the allegations of this complaint, is the later case of *Boston Nutrition Society, Inc. v. Stare,* 342 Mass. 439 (1961) which holds, in substance, that someone who without privilege publishes a false statement concerning a non-profit corporation tending to prejudice it in the public estimation and thereby to interfere with the conduct of its activities may be liable to the corporation. This case so holds without regard to proof that the defamatory statements must intend to imply mismanagement, fraud or financial instability to the corporation, adopting the test of the Restatement on the point as follows:

"...With respect to a corporation not organized for profit which depends on the financial support of the public 'one who falsely, and without privilege to do so, publishes ... matter which tends to prejudice it in public estimation and thereby to

interfer with the conduct of its activities is liable to the corporation' "

Restatement: Torts sec. 561 (2) comment on subsection (2)

Under this test, the defendant has not demonstated [sic] to a certainty that the plaintiff, a non-profit corporation is not entitled to relief under any set of facts which could be established in support of its claim that it has been demeaned in the public eye and has had the conduct of its activities interfered with by virtue of the statements.

The defendant's final point in support of the motion, that the complaint does not allege publication of any printed matters, fails by virtue of the defendant's concession at the argument that the allegation in the amended complaint that the words spoken on the radio station were "... contained in a script ..." was sufficient to allege publication.

For all of the foregoing reasons, the Clerk's office is directed to enter an endorsement denying the motion.

/s/ John M. Greaney

John M. Greaney
Justice of Superior Court

Entered: February 16, 1978

14.

COMMONWEALTH OF MASSACHUSETTS.

HAMPSHIRE, SS. SUPERIOR COURT
NO. 16397

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., d/b/a INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS,
Plaintiff

VS.

CENTRAL BROADCASTING CORPORATION,
Defendant

ANSWER

Answering to the plaintiff's amended complaint, the defendant admits, denies and alleges as follows:

1. Admits the allegations in Paragraph 1.
2. Admits the allegations in Paragraph 2.
3. Admits the allegations in Paragraph 3.
4. Denies that it "printed and published" the words alleged in Paragraph 4, but admits that Abraham Goodman spoke the words alleged on the "Sound-off" program on or about February 17, 1977.
5. Denies the allegations in Paragraph 5.
6. Denies said words were contained in a script, but admits all other allegations in Paragraph 6.

7. Denies the allegations in Paragraph 7.
8. Denies the allegations in Paragraph 8.
9. Denies the allegations in Paragraph 9.
10. Denies that it "spoke and published" the words alleged in Paragraph 17, but admits that Abraham Goodman spoke the words alleged on the "Sound-off" program on or about February 17, 1977.
11. Denies the allegations in Paragraph 18.
12. Denies said words were contained in a script, but admits all other allegations in Paragraph 19.
13. Denies the allegations in Paragraph 20.
14. Denies the allegations in Paragraph 21.
15. Denies the allegations in Paragraph 22.
16. Alleges that the allegations in Paragraphs 10-16 and 23-29 pertain only to defendant Abraham Goodman, who was dropped from the suit as a defendant by a motion allowed on January 27, 1978. Defendant nonetheless specifically denies the allegations contained in Paragraphs 12, 15, 16, 25, 28 and 29. Defendant also specifically denies the allegation in paragraphs 13, 24 and 26 that said words were contained in a script at the radio station. Defendant further alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 14 and 27.

FIRST DEFENSE

1. The plaintiff, National Association of Government Employees, through its division, International Brotherhood of Police Officers [hereinafter I.B.P.O.] was on or about February 17, 1977 engaged in the collective bargaining process with the Town of Ware.

2. On or about February 17, 1977, the issue of whether or not to accept a proposed I.B.P.O. contract was a matter of great public concern in and about the Town of Ware, and was to be presented for a vote to the citizens of the Town of Ware to obtain a public resolution of the issue.
3. Prior to February 17, 1977, the plaintiff, through its individual members and agents, actively engaged the public's attention in an attempt to influence the public resolution of the issue of whether or not to accept the proposed I.B.P.O. contract.
4. By reason of said involvement in the resolution of public issues, the plaintiff is a public figure.
5. Neither the defendant nor any of its agents have or had any personal malice towards the plaintiff at any time relevant to this action.
6. Neither the defendant nor any of its agents had sufficient time during the live broadcast on or about February 17, 1977 to consider the truth or falsehood of any statements made over the telephone by Selectman Abraham Goodman before such statements were aired.
7. Neither the defendant nor any of its agents did in fact consider the truth or falsehood of said statements or entertain any serious doubts as to their truth.
8. Because plaintiff is a public figure and defendant had no actual malice towards plaintiff and did not engage in reckless disregard of the truth, its broadcast is privileged under the First Amendment of the United States Constitution.

SECOND DEFENSE

1. The defendant incorporates by reference the facts alleged in Paragraph 3 of the complaint.

2. As a member of the Board of Selectmen of the Town of Ware, Mr. Goodman's opinions on matters of public concern were and continue to be newsworthy in the locality.
3. By airing Mr. Goodman's proffered extemporaneous telephone statement, the defendant was providing neutral reportage of a newsworthy event and is protected from liability by the First Amendment of the United States Constitution.

Wherefore the defendant demands judgment that the complaint be dismissed and that it recover its costs.

CENTRAL BROADCASTING CORPORATION

By Its Attorney

Michael P. Angelini
Bowditch & Dewey
311 Main Street
Worcester, Mass. 01608
Tel: (617) 791-3511

Dated: March 31, 1978

Hampshire SS Superior Court
Filed Apr 3 1978
/s/ Salvatore A. Polito, Clerk

COMMONWEALTH OF MASSACHUSETTS.

HAMPSHIRE, SS. SUPERIOR COURT
NO. 16397

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., d/b/a INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, Plaintiff v. THE CENTRAL BROADCASTING CORPORATION, Defendant	PLAINTIFF'S RESPONSE TO DEFENDANT'S REQUESTS FOR ADMISSIONS PURSUANT TO RULE 36

Now comes the Plaintiff in the above-captioned matter and in response to the Defendant's request for admissions states, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, with respect to each of the facts enumerated below, as follows:

1. During the month prior to February 17, 1977, plaintiff was engaged in the collective bargaining process with the Town of Ware;
   Admitted
2. On or about February 17, 1977, plaintiff was engaged

in the collective bargaining process with the Town of Ware;
Admitted

3. On or about February 17, 1977, there was a signed contract between the I.B.P.O. and the Town of Ware;
Admitted
4. On or about February 17, 1977, said contract had not be funded by voters of the Town of Ware;
Admitted
5. On or about February 22, 1977, the issue of whether or not to fund a proposed I.B.P.O. contract was put to a vote of the citizens of the Town of Ware;
Admitted
6. Prior to said vote, members of the plaintiff organization attempted to persuade various citizens of the Town of Ware to vote in favor of the proposed I.B.P.O. contract;
Admitted
7. Prior to said vote, officials of the plaintiff organization attempted to persuade various citizens of the Town of Ware to vote in favor of the proposed I.B.P.O. contract;
Admitted
8. On or about February 22, 1977, the voters of the Town of Ware rejected funding the proposed agreement;
Admitted

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., d/b/a INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS

By its Attorneys
GOLDMAN & CURTIS

/s/ Robert H. Goldman
Robert H. Goldman, Esq.
8 Merrimack Street
Lowell, Mass. 01852
(617) 454-8804

Hampshire SS Superior Court
Filed May 23 1978
/s/ Salvatore A. Polito, Clerk

COMMONWEALTH OF MASSACHUSETTS.

HAMPSHIRE, SS. SUPERIOR COURT
NO. 16397

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., d/b/a INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, Plaintiff VS. THE CENTRAL BROADCASTING CORPORATION, Defendant	DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant, pursuant to Mass. R. Civ. P. 56, moves that the Court enter summary judgment for the defendant on the grounds that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

In support of this motion, defendant relies on the record herein including the Complaint, the Amended Complaint, the Answer, Defendant's Requests for Admissions Pursuant to Mass. R. Civ. P. 36 and Plaintiff's Response to Defendant's Request for Admissions; on the affidavit of Richard H. Vaughan, and the Appendices thereto, appended hereto and marked Exhibit "X"; and on the affidavit of Jacquelyne Mur-

phy and the Appendices thereto, appended hereto and marked Exhibit "Y".

CENTRAL BROADCASTING CORPORATION

By its Attorney

/s/ Michael P. Angelini

Michael P. Angelini
Bowditch & Dewey
311 Main Street
Worcester, MA 01608
Tel: (617) 791-3511

Dated: June 9, 1978

Hampshire SS Superior Court
Filed Jun 12 1978
/s/ Salvatore A. Polito, Clerk

Hampshire, ss.
Sept. 12, 1978
After hearing, the within Motion is hereby *DENIED*
By the Court, Moran, J.
Attest: /s/ Norma J. Thibodo, Assistant Clerk

Exhibit X

COMMONWEALTH OF MASSACHUSETTS.

HAMPSHIRE, SS. SUPERIOR COURT
NO. 16397

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., d/b/a INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, Plaintiff	AFFIDAVIT OF RICHARD H. VAUGHAN IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
VS.	
THE CENTRAL BROADCASTING CORPORATION, Defendant	

I, RICHARD H. VAUGHAN, make the following affidavit upon personal knowledge in support of defendant's motion for summary judgment in the above entitled action:

1. I am 42 years old and have been a resident of Ware, Massachusetts since 1958.

2. I am now and was on February 17, 1977, the Executive Vice President of Central Broadcasting Corporation, licensee of radio station WARE, which maintains broadcasting facilities and executive offices at 90 South Street, Ware, Massachusetts.

3. I started in radio as a news and sports announcer for

WHIL in Medford, Massachusetts in 1955. Subsequently I was promoted to News and Sports director of WARE and then into sales. In 1957, I was promoted within the parent company to Sales Manager of station WHYE in Roanoke, Virginia, before becoming General Manager of station WARE in 1958. In 1963, I became Executive Vice President of station WARE, and a minority shareholder.

4. I was named "Outstanding Citizen of 1975" by the Board of Selectmen in Ware. I was appointed a Commissioner of Highway Safety by Governor Volpe in 1966 and by Governor Sargent in 1969 and 1972. Governor Dukakis has appointed me to the Governor's Commission on Physical Fitness and Sports in 1978. I am a member of the Board of Directors of Mary Lane Hospital in Ware, and of Valley Human Services, Ware-Palmer.

5. I was a member of the Town of Ware Finance Committee from 1961 to 1975 and served as Chief Negotiator for the Town of Ware in negotiating Police, Fire and Town Employees Collective Bargaining Agreements from 1970 to 1973. I have also served the Town as Recreation Commissioner, Industrial Development Commissioner and Bicentennial Commissioner.

6. On February 17, 1977, Jacquelyne Murphy was employed by WARE as the host of a radio "talk show" known as "Sound Off." Ms. Murphy was interviewed by me for the position as talk show host (staff announcer) in December of 1973 and hired by me to begin hosting the show in February of 1974. I have known her to be a highly competent and professional radio broadcaster during her tenure at WARE.

7. During late 1976 and continuing into January, 1977, the Town of Ware and Local 398 of the International Brotherhood of Police Officers (hereinafter referred to as the

"I.B.P.O.-LOCAL") were attempting to reach agreement on a new contract. On January 25, 1977, representatives of the I.B.P.O.-LOCAL and Selectmen Bernard Wilson and Gertrude T. Hamelin signed an agreement. Selectman Abraham Goodman refused to sign the agreement. A Special Town Meeting was scheduled on Tuesday, February 22, 1977 to vote on whether or not to fund the new contract. I was present at the Special Town Meeting, where it was voted not to fund the contract.

8. During the first week of February, 1977, prior to the Special Town Meeting, Mr. Goodman showed me a letter, dated February 2, 1977, which he received from William G. Norton, Executive Director of the International Brotherhood of Police Officers (hereinafter referred to as "I.B.P.O.-INT".) This letter advised Mr. Goodman of the I.B.P.O.-INT's position that he was prohibited from speaking against the contract at the Special Town Meeting. The letter threatened legal action against him personally if he should speak against the contract at that meeting. A copy of this letter is attached hereto as Appendix 1.

9. On Tuesday, February 15, 1977, I received a telephone call from a Ware River News reporter seeking a response to a February 12, 1977 letter from William G. Norton, Executive Director of the I.B.P.O.-INT to the F.C.C. Prior to that time I had not seen the letter and was not aware of its existence. The reporter read me portions of the letter which accuses station WARE of having a "vendetta" against the I.B.P.O.-LOCAL and of threatening to use the media as a weapon against the police department. I was surprised at the charges and informed the reporter that I believed station WARE was living up to its responsibility to provide unbiased news coverage and a public forum via the "Sound Off" talk show. I did not receive a copy of that letter from the

I.B.P.O.-INT. I read the full text of the letter in a front page article in the Ware River News on Wednesday, February 16, 1977. A copy of that article is attached hereto as Appendix 2.

10. On February 16, 1977, the lead editorial in the Ware River News concerned the letter from William Norton to the F.C.C. That editorial stated that: "the tone of the letter is offensive. The action of the I.B.P.O. is calculated to worsen the relationship between police and the local station." A copy of the editorial is attached hereto as Appendix 3.

11. I have known Abraham Goodman, the caller of whose words the plaintiff complains, for many years as a prominent figure in the Town of Ware. From time to time he has provided station WARE with news items, which have proved reliable, and with his own political comment. I am aware of his position as a Town Selectman.

12. I know personally many members of the plaintiff organization, and in particular I know Officer Henry Gagnon, the President of the I.B.P.O.-LOCAL No. 398 in Ware. On February 17, 1977, following the broadcast of which the plaintiff complains, I had a telephone conversation with Officer Henry Gagnon, the President of the plaintiff's local organization. At that time I invited a representative of the Union to appear on "Sound Off" on Monday, February 21, 1977, one day prior to the Special Town Meeting called to determine whether or not to fund the proposed contract. I confirmed this offer by letter on Friday, February 18, 1977, a copy of which is attached to this Affidavit as Appendix 4. Following that conversation, my understanding was that representatives of the I.B.P.O.-LOCAL and/or the I.B.P.O.-INT would appear on the "Sound Off" show on Monday, February 21, 1977.

13. On Saturday, February 19, 1977, when I arrived at station WARE, a letter from the I.B.P.O.-LOCAL was on the

reception desk declining to participate in a "Sound Off" show. A copy of that letter is attached hereto as Appendix 5.

14. Neither I, nor Central Broadcasting Corporation, nor station WARE bore the plaintiff Union any ill will or malice at the time of the broadcast of which it complains, nor at any prior or subsequent time.

Signed under the pains and penalties of perjury this 21 day of April, 1978.

/s/ Richard H. Vaughan

Richard H. Vaughan

Appendix 1

[Seal]

INTERNATIONAL BROTHERHOOD
OF POLICE OFFICERS

February 2, 1977

Mr. Abraham Goodman
Chairman
Board of Selectmen
12 Bellevue Avenue
Ware, MA 01082

Dear Mr. Goodman:

Published reports inform this organization that the Ware Board of Selectmen have approved a new police contract subject to the approval of town meeting members. Further reports and public utterances attributed to you quote you as both for and against the contract. We are further advised that you have not signed the contract although the other two members of the Board did so, thus making it legal by reaching a majority. We take issue with any attempt by you to speak against the agreement at town meeting based on prior state and court rulings.

You may be aware, and if you are not, this letter is to respectfully put you on notice, that the State Labor Relations Commission in the case of the *Town of Dracut* (MUP-345) has ruled that when the majority of the Board of Selectmen have reached a contractural [sic] agreement they have an affirmative obligation to support and defend its position before town meeting members. And, as in the Dracut case, *where you have not signed, you are prohibited from speaking against the contract, but must support it.* This position has

been upheld by the State Superior and Appeals Court and is now pending before the Massachusetts Supreme Judicial Court.

Any unlawful violation upon your part could result in enormous and needless outpouring of taxpayers' monies in legal action and possibly against you personally under Chapter 150E of the General Laws.

May I please have the benefit of an early reply.

Most sincerely,

/s/ William G. Norton

William G. Norton
Executive Director

WGN/dmc
CC: Ralph Atkins, Esquire
Henry Gagnon, President, 398

Appendix 2

WARE RIVER NEWS

19, No. 21 16 Pages Ware, Mass. Wednesday, February 16, 1977 $10 Per Year—20 Cents

IBPO Wants FCC Probe of W.A.R.E.

William G. Norton, executive director of the International Brotherhood of Police Officers, has filed a complaint with the Federal Communications Commission, charging that station W.A.R.E. has been conducting a "vocal vendetta" against members of the Ware police department "in news items and on the station's talk show".

Norton's letter, dated Feb. 12, asks the FCC conduct "a full scale investigation — to determine if station W.A.R.E. is fit to retain its license".

Richard H. Vaughan, general manager of W.A.R.E., said Tuesday that he has received no word from the FCC concerning the letter and that the local IBPO has not provided a copy to the station.

Vaughan indicated he was surprised at the allegations contained in the letter when the **Ware River News** reporter read portions to him.

No specific charges were cited, Vaughan said, and no action against the station has been instituted by members of the Ware department, which would seem to be a logical recourse if local policemen were unhappy at radio coverage.

Vaughan added that he felt the station was living up to its responsibility to provide

unbiased new [sic] coverage for the area and a public forum via its talk show, "Sound Off".

The letter from Norton was the second in recent weeks which addressed itself to matters in Ware. Two weeks ago, Norton wrote to Chairman Abraham Goodman of the Ware Board of Selectmen, who was [sic] opposed the signing of the new police contract, and warned him that he could not legally speak against the contract, at the special town meeting Feb. 22. Goodman last week rejected the IBPO position as an infringement of his first amendment rights.

The complete text of the most recent letter from Norton to the FCC appears below:

FCC
1919 M Street, N.W
Washington, D.C. 20554
Attention: William B. Ray

Dear Mr. Ray:

For a long period of time now, members of the Ware, Massachusetts Police Department, have been complaining bitterly over radio station WARE's vocal vendetta against them in news items and on the station's talk show.

The situation has become so anti-police that the officers have resorted to taping hours of the WARE news programs and talk shows which portray, at times, almost a daily and constant cacophony of police misinformation, unfounded allegations of police procedures and actions, deliberate distortions of facts and otherwise colour police activities. Its effect is to hold them up to ridicule thereby seriously damaging their professional reputation and in turn cause the families of the officers to suffer.

Why a station which is licensed by the federal government to protect a public trust is so bent on pitting neighbor against neighbor and in creating a community crisis is beyond this writer. We do not know if it is station policy or the work of individuals.

This organization, which represents the Ware police, is fully cognizant of our constitutional guarantees to freedom of free speech and expression and the need for its preservation. However, when that speech and expression is sullied, bent, twisted and treated in such a cavalier manner exhibited by station WARE then we must protest, and protest vigorously.

Station WARE, the police maintain, does not strive for accuracy or fairness when it comes to police. Rather, it appears that they take some delight in their anti-police posture to use them as "whipping boys" to improve their ratings.

But, now, we fear, that they may have gone beyond the bounds of free speech and expression. For we have been informed by our police members that radio station WARE has recently threatened to use the media as a weapon against the department if it does not acquiesce to a demand by two WARE officials to subvert the law. Failure to comply with their demands would bring about the molding of public opinion against a pending police contract, subversion of a governmental process (town meeting), interfere with a contractual agreement, and otherwise force certain police officers to compromise their oath of office.

There is no other forum for the police to appeal to but the Federal Communications Commission. They as individuals cannot speak out for fear of violating departmental rules. No one in the body of local government politic [sic] has seen fit to champion, defend, or present their position.

It would appear then, that radio station WARE has gone beyond the pale of free speech, has abused its public trust and is now bent on creatings [sic] its own fiefdom and woe-and-behold to those who would dare challenge them.

As representatives of the

police in Ware, and acting from their demand, we respectfully request that the agency conduct a full-scale investigation and to determine if station WARE is fit to retain its license.

Very truly yours,
William G. Norton
Executive Director
IBPO

Five Articles Face Voters At Feb. 22 Session

Ware voters will assemble at the town hall on Tuesday, Feb. 22 at 7 p.m. to act on a five-article warrant at a special town meeting. A quorum of 100 registered voters is needed to conduct business at the meeting.

To be acted up [sic] are the following items:

Article 1: to approve a transfer of $4000 to pay for unpaid bills of prior fiscal periods, in this case, the charge or [sic] an insurance liability audit performed for the town.

Article 2: to transfer a sum of $15,000 to the veteran's [sic] service casework account.

Article 3: to transfer $10,000 to the highway employees [sic] salary account.

Article 4: to transfer $2500 to the interest account.

Article 5: to transfer money (estimated at between $10,000 and $15,000) to meet expenses of fiscal 1976-77 for the new police contract.

Appendix 3

WARE RIVER NEWS

Vol. 89, No. 21 16 Pages Ware, Mass. Wednesday, February 16, 1977 $10 Per Year-20 cents

Page 4

[Seal]

THE WARE RIVER NEWS
Established Oct. 26, 1887

Published Weekly
at Ware, Mass. 01082
on Wednesday
by
Thomas A. Turley and
Patrick H. Turley

Floyd R. Maynard
Editor

Patricia Kane Gittes
Reporter

Advertising Rep.
Peg Stacy 967-3505

CORRESPONDENTS
Gilbertville
Mrs. Francis Reidy 477-6322

Warren
Pat Burnham 436-5057
436-5463

(Second class postage paid at Ware, Massachusetts. Subcriptions $10.00 yearly, renewals $10.00)

[Seal]

Member:
New England
Press
Association

"All that is necessary for the triumph of evil is that good men do nothing."
Edmund Burke

K a l e i d o s c o p e

WE CANNOT ESCAPE the feeling that the International Brotherhood of Police Officers, in the person of its

executive Director William G. Norton, is becoming obsessed with the various problems of the Ware police department. This week, he calls for an FCC probe of station W.A.R.E. because of its "vocal vendetta" against members of the Ware PD. Norton takes exception to both the news programming and the talk show of the local station. We would not presume to serve as a referee in the dispute between the IBPO and W.A.R.E. We would point out that a radio station is subject to the same libel laws as are newspapers. The **Ware River News** can be sued for libel for material it prints, even if libelous material is contained in a letter to the editor over someone else's signature. W.A.R.E. can be challenged the same way, if someone feels he has been libeled on a talk show, despite any disclaimer by the station. If the IBPO, or members of the local police department, feel they have been libeled, they are entitled to bring suit. Norton makes no specific charges against W.A.R.E. in his letter. The tone of the letter is offensive. The action of the IBPO is calculated to worsen the relationship between police and the local station. And when you come right down to it, we do not like an "international" union telling anyone in this town how they should conduct themselves. If it is a Ware problem, Ware people should resolve it. This, to us, is more important than the remote threat of infringement of the freedom of the press.

Appendix 4

Officer Henry Gagnon
President IBPO Local
Anderson Road
Ware, MA 01082

February 18, 1977

Henry,

As per our telephone conversation of February 17, 1977, I am making our talk show, Sound Off, available to your group on Monday, February 21, 1977.

The program is on at 12:15 so please be at the studios by 12 noon.

Looking forward to seeing you at that time.

Warmest Wishes,
Richard H. Vaughan,
Executive Vice President

RNV/dsa
Sent

Appendix 5

Mr. Richard H. Vaughan
Executive Vice President
Radio Station W.A.R.E.
90 South St.
Ware, Ma.

February 19, 1977

Dear Mr. Vaughan:

At a meeting of the Ware Local 398 I.B.P.O. it was decided by the membership that presently there is no way in which any of the officers could in good conscience appear on the talk

show. We find W.A.R.E.'s lack of fairness when dealing with the police objectionable.

W.A.R.E.'s support of Mr. Goodman's position after he alleged that members of the International were Communist was too overwhelming to accept. By the very nature of these accusations directed at the International, each and every member of the Union throughout the country has been labled a Communist, and will be so notified. W.A.R.E. opposition to the Ware Police Department is quite clear to us.

Membership Ware Local 398
I.B.P.O.

Exhibit Y

COMMONWEALTH OF MASSACHUSETTS.

HAMPSHIRE, SS. SUPERIOR COURT
CIVIL ACTION
NO. 16397

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., d/b/a INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, Plaintiff VS. CENTRAL BROADCASTING CORPORATION, Defendant	AFFIDAVIT OF JACQUELYNE MURPHY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, JACQUELYNE MURPHY, make the following affidavit upon personal knowledge in support of defendant's motion for summary judgment in the above entitled action:

1. I am 26 years old and have been a resident of Ware, Massachusetts since 1973.

2. In December, 1973, I became employed by the defendant Central Broadcasting Corp., which does business as radio station WARE with broadcasting facilities at 90 South Street, Ware, Massachusetts. I was hired for the purpose of moderating a radio talk show known as "Sound Off."

3. Prior to working for station WARE, I worked as an intern at station WBZ in Boston. I received a B.S. degree from Boston University School of Communications and Public Relations, majoring in journalism, in December, 1973.

4. The Sound Off show format involves guest appearances by knowledgeable people who would discuss various topics of public interest. Members of the listening audience were invited to telephone in to the station with questions or comments. Approximately two days each week are designated as open forums and devoted entirely to listener calls. The show is broadcast daily, Monday through Friday, from 12:15 p.m. to 1:00 p.m.

5. In connection with the broadcast of the Sound Off show, there is available to me a tape delay system which tape records the conversation being broadcast (to include telephone calls made by members of the listening audience) and delays the transmission for approximately ten seconds. The device is controlled by a push button (the "abort button"). I hear the conversation as it is being made, and then have approximately ten seconds, in which to make a judgment to abort the conversation by pushing the abort button. I have used this abort button very rarely, and only to screen out obscenity.

6. On February 17, 1977, the Sound Off Show was designated as an open forum. I received a phone call from Mr. Abraham Goodman. I was personally acquainted with Mr. Goodman and knew him to be a Selectmen [sic] of the Town of Ware.

7. I understood Mr. Goodman to complain about two letters written by the International Brotherhood of Police Officers (hereafter "I.B.P.O.") one to Mr. Goodman warning him not to speak against funding the contract at the Special Town Meeting, and one to the F.C.C. complaining about station W.A.R.E. I was familiar with both letters because I had

read about them in the Ware River News on February 16, 1977. I did not consider aborting any part of Mr. Goodman's remarks because the letters concerned Mr. Goodman and had been made public by the I.B.P.O., and I believed, and still do, that Mr. Goodman had a right to respond publicly. A copy of the transcript of Mr. Goodman's entire conversation is attached hereto as Appendix 1. On said transcript I am identified as the "announcer" and Mr. Goodman is identified as the "caller." I have examined the transcript and found it to be accurate.

8. Subsequent to Mr. Goodman's call on February 17, 1977, I received a second call on the same subject from an unidentified caller, who complained of Mr. Goodman's remarks. Following this phone call, I made some brief remarks about the subject matter.

9. A copy of the transcript of this second call and my subsequent remarks is attached hereto as Appendix 2. I have examined the transcript and found it to be accurate.

10. I did not then and do not now understand Mr. Goodman's remarks to accuse the plaintiff of being Communist. I stated this clearly to the unidentified caller on February 17, 1977, during the show (see paragraph 8 and Appendix 2).

11. I did not at the time of the conversation consider whether there might be some listeners who could understand Mr. Goodman's remarks in the manner complained of.

12. I did not at the time of the conversation consider whether or not the plaintiff might or might not be connected with Communism in any way.

13. To the best of my memory, prior to Mr. Goodman's remarks on February 17, 1977, I have never discussed the subject of whether the plaintiff is connected with Communism or not with Mr. Goodman or with any other party.

14. In my tenure as moderator for the Sound Off show I have interviewed hundreds of people, including such persons

as Senator Ted Kennedy, Governor Michael Dukakis, and State Treasurer Robert Crane, and have always attempted to do so with honesty and fairness.

15. At the time of and prior to the February 17, 1977, broadcast, I had no feeling of ill will or malice toward the plaintiff or its members, nor do I now.

Signed under the pains and penalties of perjury this 21st day of April, 1978.

/s/ Jacquelyn Murphy

Jacquelyn Murphy

Appendix 1: Sound Off, 2/17/77

Conversation between Abraham Goodman and Jacquelyn Murphy

Announcer: Sound off you're on the radio.

Caller: Hello.

Announcer: Hello.

Caller: Jackie?

Announcer: Yes.

Caller: This is Abe Goodman.

Announcer: How do you do Sir.

Caller: Well, I'm very angry at the moment.

Announcer: Why is that?

Caller: Because we're supposed to be living in a free and a democratic country and I don't think we are. This episode with the police union making demands on the station as well as myself, I want to go on record publicly that I will support the station a hundred percent.

Announcer: Thank you very much.

Caller: Because, if we do not get together and stop the inroad of communism, something will happen.

Announcer: Well, I agree with everything you're saying, I also think that, um, Roby Maynard, the editor of the Ware River News came out with a rather strong comment in his kaleidoscope column and I think it does go back to the fact that it's up to the Ware taxpayers and the Ware residents to handle the affairs of the Town of Ware and that's what we elected you to do and if you can't speak. . . .

Caller: Well, that's right, I agree with you. Talking about the taxpayers and the residents and home owners publicly, I would like to ask all the people that possibly can to come to the special town meeting and as far as being intimidated by the Police Department from not voting the way they see fit, I intend to ask for a secret ballet [sic], but it's foolish for me to ask for anything unless I get support.

Announcer: Right.

Caller: Therefore if I ask for the ballet [sic], the people feel they need it, then I need the support. They can vote the way they see fit. Living in a democratic country the last stronghold is the town meeting and therefore they have all the opportunity in the world to speak the way they feel or raise their hand for a vote.

Announcer: Uh huh.

Caller: I'm talking about the special town meeting. I would say that it would take approximately $50,000 to fund those five different articles. The Town is faced, I shouldn't say this but I will, the Town is faced in a serious condition. You know as well as I do that the Treasurer borrowed money in anticipation of taxes that will be paid in May. In the meantime, the Town is spending every cent that is available to fund the contracts or the articles on the special town meeting, the Town has approximately $20,000 in free cash, $11,444 in title II money and another title of about $9,000 something. So even if all the articles are voted for I don't believe that the Town has enough money to fund these articles.

Announcer: Uh huh. Well

Caller: Then the result will be that when we have the annual town meeting in May the assessors will not be able to get up and be big and proud

that they will give $50-$60-or $75,000 towards the Tax Rate because there will be very little money available. Therefore, the annual town meeting will bring to the public, to the taxpayer, one particular point. It will mean that every article in the annual town meeting will be raised and appropriate. Therefore, it will reflect on the tax rate.

Announcer: Uh huh.

Caller: So if people are earnest about what they tell me on the street, then I would like to have the people come to the town meeting, the special one next week, the annual one in May and tell the Town's people their feelings by the way they vote.

Announcer: Well, I, I think, Mr. Goodman that, that the only unfortunate part is and it's to [sic] bad that you as our Chief Executive won't be able to speak, uh, at the special town meeting, uh, but one thing that they cannot stop you or anyone from doing is voting, and if people get out and exercise that very basic democratic right to vote then I think we'll all be a lot better off.

Caller: Well, that's right. I understand through heresay that the attorney for the union will be present at the special town meeting. He will ask to speak. If the moderator gives him permission to speak then I want the union attorney to give me the privilige [sic] to speak as

well without being forced or intimidated or said that if I say anything that I will be brought to court.

Announcer: Well, if some guy can come into the Town from God knows where and talk on the Town Hall floor at a town meeting then certainly the Chairman of the Board of Selectmen who is elected by the taxpayers of Ware certainly should be allowed to speak on the Town Hall floor.

Caller: Well, I feel. . . .

Announcer: But, of course, ah, you have to look at it this way, if you do talk and they arrest you at least you get a first hand look at the lockup. (Laughs)

Caller: Well, that's right, but I should be given the opportunity to express my opinion why I feel one way or another.

Announcer: I agree with you and I hope that you, I just hope a lot of lot [sic] of people turn out for this special town meeting.

Caller: Well, I hope so. But, again, I want to say that if there is anything I can help the station towards fighting the inroads of communism which in this particular case is the union, police union, I will be glad to help.

Announcer: Well, I thank you very much, Sir and I just. . .

Caller: You're welcome.

Announcer: I just think that, uh, what we all have to do is just be very big people and not stoop to a very low level.

Caller: That's right.

Announcer: O.K. Thank you very much for your call.

Caller: Bye.

Announcer: Bye Bye.

Appendix 2: Sound-Off, 2/17/77

Conversation between unidentified caller and Jacquelyn Murphy

Announcer: This is Sound Off. I'm Jackie, we have a couple of minutes left in the program on an open forum. Sound Off, you're on the air.

Caller: I'd like to express my opinions on the Police Department.

Announcer: O.K.

Caller: Now it's been a proven fact that the Town of Ware has the lowest crime rate in this part of the state. Now I believe that the state has a very light cri- crime rate, that has been proven that it has gone up over the past months at a steady increase. Now where does Mr. Goodman come off calling the Police Department Communists on an outrate

[sic] basis saying that the Police in one sense of the word are Communists?

Announcer: Well, if, if I can interpret what he's saying, uh, myself, I would think that what he is driving. . .

Caller: Now, wait a minute. A police officer in this state becomes a police officer because he is concerned about his country and his community. Now, this is one main factor [sic] a man becomes a police officer.

Announcer: Well, I would, I would hope that is the reason.

Caller: . . . .an outrate [sic] statement that the Police Department is Communist.

Announcer: Don't you think that in [sic] an infringement on an elected. . . .

Caller: Don't you think, don't you think that the police officers in this Town aren't doing their job, we have the lowest crime rate and if you read your newspapers almost every town around here is being stricken with armed robberies, burglaries, and breaking and entering and the Town of Ware has the lowest crime rate around. Now if the Town of Ware and their Police Department is not doing their job, then, damn it, who's doing it.

Announcer: O.K. well, I will answer you. First of all, Mr. Goodman had nothing to say about the fact that the Police Department was Communist.

Caller: He made an outrate [sic] statement that the Police Department was a Communist, almost a Communist rule.

Announcer: No, he didn't. You interpreted it incorrectly.

Caller: . . . Goodman is a Police Commissioner.

Announcer: Right.

Caller: Now, if his Department is Communist and he is the leader of this Department then he's a Communist. All right?

Announcer: O.K. we're not going to get anywhere in this conversation.

Caller: No, obviously we're not.

Announcer: O.K., thank you for your call. First of all, it seems that I can't argue with you because you won't allow me the time to speak on my program, I'll take the time now. Mr. Goodman did not say anything about the Police Department being Communist. What he said was the infringement upon a basic American Democratic right, and that is the right to free speech, is being infringed upon by this union, this International Union or Brotherhood of Police Officers that is coming in, and first of all telling the Chairman of the Board of Selectmen, an elected official of the taxpayers, that he cannot speak, and secondly, is now saying that the radio station, which is

licensed to serve community needs is not doing that and is now on a, I believe the word is, vocal vendetta. There is [sic] so many big words in that thing that I hope the F.B.C. [sic] has a very good attorney to interpret it. However, as far as Mr. Goodman saying anything about the Police Department being Communist, you're incorrect. What he was saying is that this union is attempting to subvert the right to free speech and as far as having the lowest crime rate, fine, terrific, I think that's great. In a town of 8,000 people that's wonderful. Maybe it has to do with the fact that a lot of people are leaving or also it could have something to do with the fact that the Police Department is doing a good job. Nobody has ever said that what they were doing as police officers was not good in the event of solving crime. What they are saying is that perhaps somewhere along the line there are some things going on within the ranks of that Police Department that should not be occurring. And that the Police Commissioners and the Police Chief do not have full control of that Department. And that's all I want to say on the issue. As far as what's going to happen with the Police Contract at the Town Meeting Tuesday night, that's up to the voters. And the radio station and Abe Goodman and anybody else who wants to get involved in it cannot stop the voters from passing that Contract if they want to pass it. Nor can we say, everybody go out and vote for it and get everybody to vote for it because it's

an individual matter and it's up to the individual to decide which way he or she wants to vote and the only thing we can do is ask all of you to get out and vote. That's the most important thing. And that's the end of Sound Off. Have a very nice day. I'll be back tomorrow at 12:15 with State Senator Robert Wetmore.

COMMONWEALTH OF MASSACHUSETTS.

HAMPSHIRE, ss. SUPERIOR COURT
CIVIL ACTION
NO. 16397

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., d/b/a INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, Plaintiff	AFFIDAVIT OF WILLIAM G. NORTON
VS.	
CENTRAL BROADCASTING CORPORATION, Defendant	

I, WILLIAM G. NORTON, make the following affidavit upon personal knowledge;

1. The National Organization of Government Employees, hereinafter referred to as NAGE, is a foreign corporation duly organized and existing under the laws of Delaware as a non-profit corporation with a principal office in Boston, Massachusetts, and is a labor union with a division known as the International Brotherhood of Police Officers, hereinafter referred to as IBPO.

2. I have been employed by the NAGE for approximately eleven years. Prior thereto, I spent twenty-three years as a newspaperman with the Hearst chain and the Boston Herald-Traveler.

3. Presently, I am editor of the Fed News, a monthly chronicle published by the NAGE and containing information of interest to government employees. I am also editor of the Police Chronicle, a monthly chronicle published by the IBPO and containing information of interest to police officers. Formerly, I was National Secretary of the NAGE and Executive Director of the IBPO.

4. A part of my responsibilities with the NAGE and its division, the IBPO includes traveling throughout the United States and extensively in Massachusetts, directing and promoting the activities of the said union amongst its members, and recruiting new members, as well as compiling the aforementioned publications.

5. The aforesaid division of the NAGE, the IBPO, has always enjoyed an excellent reputation not only amongst its members but also amongst members, organizers, and leaders in the union movement in general and with the public. The widespread reputation of the IBPO has been that of a reputable union of police officers, devoted to the interests of its members, patriotic, honest, and carrying on its activites in accordance with the law.

6. The IBPO, has never had any involvement, directly, or indirectly, with Communists or Communist sympathizers. It is not now, or has it ever in the past, espoused in any way the principles or goals of the Communist party or any Communist or related movement.

7. Indeed, it is a violation of Article V, Section 1(h) of the IBPO's Constitution or By-laws to join or lend "active support to any organization or movement whose purposes or objectives are contrary to the fundamental principles of the established government of the United States of America, such as a Communist or Fascist movement." Furthermore, every member of the IBPO takes a solemn oath swearing to uphold the laws of this country.

8. I have read a transcript of the broadcast complained of and I consider it defamatory and highly injurious to the IBPO's reputation; further, I know of actual injury which has resulted directly from the publication of this defamatory material, including the loss of potential members and the loss of benefits from an employment contract between Local 398 of the IBPO and Town of Ware which contract had been agreed to by the said local and the Town's Selectmen but afterwards failed to receive funding.

9. On information and belief I am aware of the fact that the host of the radio "talk show", known as "Sound Off", Jacquelyne Murphy, knew of the IBPO's excellent reputation in the community and knew that the said Union was not, directly or indirectly, involved with any Communist movement or infiltration by Communists into local government. Further, knowing this, Ms. Murphy, deliberately, and recklessly allowed the statement alleged in the Complaint herein, to be broadcasted by the radio station, WARE, which the Defendant operates. This has been but one part of the said station's concerted effort to deliberately undermine the reputation of the police force in Ware, Massachusetts, and the IBPO, to inhibit the force's ability to function efficiently and effectively and to inhibit the IBPO's ability to act as the bargaining agent for the police force.

10. The activities of the IBPO are strictly limited to providing certain benefits to its local union members and acting as exclusive bargaining agent for them; further, the statements complained of which were broadcast over the Defendant's radio station bore no relation whatsoever to those functions and do not in any way touch upon the said unions [sic] activities, and, accordingly, it should not be considered a public figure.

11. I have examined and am familiar with the record in this case, including the Complaint; the Amended Complaint; the

Answer; Motion to Dismiss Finding on Defendant's Motion to Dismiss (Greaney, J., appended hereto); and, Affidavits of Richard H. Vaughan and Jacquelyn Murphy and Appendices thereto.

Signed under the pains and penalties of perjury this 3rd day of August, 1978.

/s/ William G. Norton

William G. Norton

Hampshire ss. Superior Court
Filed Sep 7 1978
/s/ Salvatore A. Polito, Clerk

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 78-0330-CV

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC. dba

vs.

CENTRAL BROADCASTING CORPORATION

ORDER

This case came on for hearing on the petition of the defendant Central Broadcasting Corporation for interlocutory relief under G. L. c. 231, § 118, namely, for authorization to prosecute an appeal from an interlocutory order dated September 12, 1978, by which a judge of the District Court Department of the Trial Court, sitting in the Superior Court Department by designation, denied the said defendant's motion for summary judgment in a defamation action. The action raises important First Amendment issues having to do with the nature and extent of the obligation of a radio station to screen out allegedly defamatory statements phoned in to a talk show in the context of a discussion on a debated issue of town policy apparently attended by active local interest and concern. I am persuaded that the importance of the issue and the importance of the role that summary judgment can play in minimizing the chilling effect of burdensome litigation on the exercise of First Amendment rights (see *Washington Post Co. v. Keogh,* 356 F.2d 965, 968 [D.C. Cir. 1966]; *Time, Inc. v. McLaney,* 406 F.2d 565, 566 [5th Cir. 1969]) justifies departure from what is (or should be) a strong policy against allowing interlocutory appeals from orders denying motions for summary judgment. Precedent under 28 U.S.C., § 1292(b),

for allowing motions for interlocutory appeal of orders denying summary judgment in First Amendment cases is found in *Washington Post Co. v. Keogh, supra; Time, Inc. v. McLaney, supra; Time, Inc. v. Ragano,* 427 F.2d 219 (5th Cir. 1970); *Vandenburg v. Newsweek, Inc.,* 441 F.2d 378 (5th Cir. 1971); and *Time, Inc. v. Johnston,* 448 F.2d 378 (4th Cir. 1971). See also *Herbert v. Lando,* 568 F.2d 974, 983 (opinion of Kaufman, J.) and 985 and n.6 (opinion of Oakes, J.) (2nd Cir. 1977).

The defendant Central Broadcasting Corporation is hereby authorized to file and prosecute an interlocutory appeal from the order docketed September 12, 1978, denying its motion for summary judgment. A notice of appeal, accompanied by a copy of this order, should be filed in the Superior Court Department on or before January 16, 1978, and the Clerk of Courts for Hampshire County should thereafter follow the customary procedure for assembly of the record and issuance of notice thereof. After the parties, following the usual procedure, shall have filed briefs and appendix, either party may apply for expedited hearing of the appeal.

By the Court (Armstrong, J.)

/s/ Paul J. Swartz
Assistant Clerk

Entered: December 27, 1978.

Date: December 28, 1978
A TRUE COPY.
ATTEST: /s/ Paul J. Swartz, Asst. Clerk

Hampshire ss Superior Court
Filed Dec 29 1978
/s/ Salvatore A. Polito, Clerk

Supreme Court, U. S.
FILED
APR 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1235.

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., D/B/A INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS,
PETITIONER,

v.

CENTRAL BROADCASTING CORPORATION,
RESPONDENT.

Brief for the Respondent in Opposition to the Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

EVAN T. LAWSON,
HOWARD J. WAYNE,
LAWSON & WAYNE,
99 High Street,
Boston, Massachusetts 02110.
(617) 542-4010

Of Counsel:
MARK L. ROSEN, ESQUIRE,
SIFF & NEWMAN, P.C.,
233 Broadway,
New York, New York 10007.

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1235.

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., D/B/A INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS,
PETITIONER,

v.

CENTRAL BROADCASTING CORPORATION,
RESPONDENT.

Brief for the Respondent in Opposition to the Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Questions Presented.

1. Does the decision of the Supreme Judicial Court rest upon independent adequate non-federal grounds?
2. Has the Supreme Judicial Court decided a federal question of substance not theretofore determined by this Court, or decided it in a way probably not in accord with applicable decisions of this Court?

Statement of the Case.

A. Procedural History.

This is a defamation action for money damages in the amount of Three Million ($3,000,000.00) Dollars brought by the National Association of Government Employees, Inc. d/b/a International Brotherhood of Police Officers (the Union) against Central Broadcasting Corporation (the Station) (P. 45-53).

The Station's Motion for Summary Judgment under Mass. R. Civ. P. 56 was denied without finding or opinion by a judge of the Massachusetts Trial Court on September 12, 1978 (P. 28).[1] Thereafter, the Station obtained leave to prosecute an interlocutory appeal which was heard by the Supreme Judicial Court of Massachusetts.[2] The Supreme Judicial Court reversed and ordered entry of a judgment dismissing the action on November 13, 1979 (P. 40). It held that the statements in issue were not defamatory because they were expressions of "opinion on disclosed or assumed facts" (P. 32); that the statements were "too amorphous a characterization to be actionable" (P. 35), and that there was no genuine issue as to the material fact of knowledge of falsity or reckless disregard of the truth in making them (P. 37). This Petition for a Writ of Certiorari followed.

B. Facts.

The Station operates Radio Station W.A.R.E. in the Town of Ware. It is the only locally-owned radio station servicing

[1] The Massachusetts Rules of Civil Procedure track the Federal Rules. The text of Massachusetts Rule 56 is set out in full in Appendix A, *infra* at 24.

[2] A Massachusetts statute, G.L. c. 231, § 118, provides for appellate relief from interlocutory orders of the Trial Court (P. 28).

the Town's approximately 8,000 residents. As a part of its community service, the Station provides a regularly-scheduled open forum radio program entitled "Sound Off." Members of the community are invited to telephone in their questions, views and opinions as to matters of current public interest and concern which are broadcast "live" to the public (P. 90).[3]

The announcer of the "Sound Off" program was provided with a standard ten-second delay system and "abort" button. She had ten seconds to decide whether to prevent any caller's ongoing conversation from being broadcast (P. 90).

During late 1976 through January, 1977, the Union was negotiating a new labor contract with the Town of Ware. The collective bargaining process was the subject of intense local interest and was a constant topic of debate in the media as well as at public and private meetings (P. 75-76).

After much debate and discussion, an agreement was reached which was signed on January 25, 1977, by the Union and all the Ware Selectmen except the Chairman of the Board, Abraham Goodman (Goodman) (P. 76). The agreement required approval and funding by the voters of the Town of Ware and was scheduled to come before a Special Town Meeting on February 22, 1977 (P. 69-70).

During the first week of February, 1977, Goodman received a letter from the Executive Director of the Union warning that Goodman was prohibited from speaking out publicly against the contract; demanding that he "must support it"; and threatening that his failure to do so "could result in enormous and needless outpouring of taxpayers'

[3] Additionally, the "Sound Off" program has featured interviews with such public figures as Senator Kennedy, Governor Dukakis and State Treasurer Crane (P. 91-92).

monies in legal action and possibly against you personally" [sic] (P. 76, 79-80).[4]

On February 16, 1977, the Ware River News reported in a front page article that the Union had accused the Station of bias against it in a complaint to the Federal Communications Commission (P. 76-77). The text of the Union's letter of complaint to the FCC was released to the press by the Union and was reproduced in the newspaper (P. 81-84). It accused the Station of conducting a "vocal vendetta" against the Union including "almost a daily and constant cacophony of police misinformation, unfounded allegations of police procedures and actions, and deliberate distortions of fact." The Union accused two officials of the Station of demanding that the police department "subvert the law" and that "failure to comply . . . would bring about the molding of public opinion against a pending police contract, subversion of a governmental process (town meeting), interference with a contractual agreement, and otherwise force certain police officers to compromise their oaths of office." The letter concluded with a demand that the FCC conduct a "full-scale" investigation to determine if the Station should retain its license. The newspaper article also related the Union's demand upon Goodman and his response which "rejected the IBPO position as an infringement of his First Amendment rights" (P. 82-84). The newspaper published an editorial criticizing the Union's actions (P. 85-86).

On February 17, 1977, Goodman called "Sound Off," identified himself, and expressed his views concerning the efforts of the Union to prevent him from informing the voters and

[4] This threat was characterized by the Supreme Judicial Court as "exceedingly rash and ill-advised" in view of its decisions on the subject in 1974 and 1976, as well as a decision rendered in 1978 after the letter was written (P. 29, fn. 3). Compare P. 14, fn. 10.

people of Ware of his position and the Union's attack on the Station (P. 90-91).

Caller: This is Abe Goodman.

Announcer: How do you do Sir.

Caller: Well, I'm very angry at the moment.

Announcer: Why is that?

Caller: Because we're supposed to be living in a free and a democratic country and I don't think we are. This episode with the police union making demands on the station as well as myself, I want to go on record publicly that I will support the station a hundred percent.

Announcer: Thank you very much.

Caller: Because, if we do not get together and stop the inroad of communism, something will happen.

Announcer: Well, I agree with everything you're saying, I also think that, um, Roby Maynard, the editor of the Ware River News came out with a rather strong comment in his kaleidoscope column and I think it does go back to the fact that it's up to the Ware taxpayers and the Ware residents to handle the affairs of the Town of Ware and that's what we elected you to do and if you can't speak. . . .

Caller: Well, that's right. I agree with you. Talking about the taxpayers and the residents and home owners publicly, I would like to ask all the people that possibly can to come to the special town meeting and as far as being intimidated by the Police Department from not voting the way they see fit, I intend to ask for a secret ballet [sic], but it's foolish for me to ask for anything unless I get support.

Announcer: Right.
(P. 92-94).

Goodman then stated his opinion that the effect of the agreement would be to raise the tax rate of the Town and reiterated his belief that, as the Chairman of the Board of Selectmen, he should be free to express his opinion to the voters (P. 94-96).

Goodman concluded with a return to his analogy between the tactics of the Union and communistic suppression of free speech.

Announcer: Well, if some guy can come into the Town from God knows where and talk on the Town Hall floor at a town meeting then certainly the Chairman of the Board of Selectmen who is elected by the taxpayers of Ware certainly should be allowed to speak on the Town Hall floor.

Caller: Well, I feel. . . .

Announcer: But, of course, ah, you have to look at it this way, if you do talk and they arrest you, at least you get a first hand look at the lockup. (Laughs)

Caller: Well, that's right, but I should be given the opportunity to express my opinion why I feel one way or another.

Announcer: I agree with you and I hope that you, I just hope a lot of lot [sic] of people turn out for this special town meeting.

Caller: Well, I hope so. *But, again, I want to say that if there is anything I can help the station towards fighting the inroads of communism which in this particular case is the union, police union, I will be glad to help.*

Announcer: Well, I thank you very much, Sir and I just . . .

Caller: You're welcome.

Announcer I just think that, uh, what we all have to do is just be very big people and not stoop to a very low level.

Caller: That's right.

Announcer: O.K. Thank you very much for your call.
(P. 96-97.) (Emphasis added.)

At the end of the program, an unidentified caller aired his views. He expressed support for the Union and gave his opinion on Goodman's remarks. The caller was immediately challenged by Murphy. As the following transcript of that "on-air" conversation reveals, Murphy believed that Goodman had not accused the Police Department of being communists.

Caller: He made an outrate [sic] statement that the Police Department was a Communist, almost a Communist rule.

Announcer: No, he didn't. You interpreted it incorrectly.

Caller: . . . Goodman is a Police Commissioner.

Announcer: Right.

Caller: Now, if his Department is Communist and he is the leader of this Department then he's a Communist. All right?

Announcer: O.K. We're not going to get anywhere in this conversation.

Caller: No, obviously we're not.

Announcer: O.K. thank you for the call. First of all, it seems that I can't argue with you because you won't allow me the time to speak on my program, I'll take the time now. *Mr. Goodman did not say anything about the Police Department being Communist. What he said was the infringement upon a basic American*

Democratic right, and that is the right to free speech, is being infringed upon by this union, this International Union of Brotherhood of Police Officers that is coming in, and first of all telling the Chairman of the Board of Selectmen, an elected official of the taxpayers, that he cannot speak, and secondly, is now saying that the radio station, which is licensed to serve community needs is not doing that and is now on a, I believe the word is vocal vendetta. There is [sic] so many big words in that thing I hope the F.B.C. [sic] has a very good attorney to interpret it. *However, as far as Mr. Goodman saying anything about the Police Department being Communist, you're incorrect. What he was saying is that this union is attempting to subvert the right of free speech* and as far as having the lowest crime rate, fine, terrific, I think that's great. . . . And the radio station and Abe Goodman and anybody else who wants to get involved in it cannot stop the voters from passing that Contract if they want to pass it. Nor can we say, everybody go out and vote for it and because it's an individual matter and it's up to the individual to decide which way he or she wants to vote and the only thing we can do is ask all of you to get out and vote. And that's the end of Sound Off. Have a very nice day. I'll be back tomorrow at 12:15 with State Senator Robert Wetmore.

(P. 99-101.) (Emphasis added.)

On February 17, 1977, the Station offered the Union the opportunity to appear on "Sound Off" and air its views on February 21, the day before the Special Town Meeting. The Union refused (P. 77-78, 87-88).

Argument.

A. The Petition Should Not Be Granted Because the Decision of the Supreme Judicial Court Rests upon Independent Adequate Non-Federal Grounds.

The statutory basis for this Court's Certiorari jurisdiction provides that "[f]inal judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court . . . [b]y writ of certiorari . . . where any title, right, privilege or immunity is . . . claimed under the Constitution . . . of the United States." 28 U.S.C. § 1257(3). The purpose of the statute is reflected in Rule 19 of this Court which provides that among the "special and important reasons" warranting exercise of Certiorari jurisdiction are cases where a state court "has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Consequently, a Petition for a Writ of Certiorari will be denied where the judgment to be reviewed is supportable as a matter of state law.

> It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the state; that this Court's power to review decisions of state courts is limited to their decisions on federal questions [footnote omitted]; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled prin-

> ciples or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court [footnote omitted].

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 (1930) and cases cited in footnotes 6 and 7.

See also *Dixon v. Duffy,* 342 U.S. 33, 34 (1951) ("judgment may rest on a non-federal ground, thus calling for dismissal of our writ of certiorari"); *Young v. Ragen,* 337 U.S. 235, 238 (1949) ("Of course we do not review state decisions which rest upon adequate nonfederal grounds"); *Henry v. Mississippi,* 379 U.S. 443, 446 (1965) ("It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds"); *Hammerstein v. Superior Court of California in and for County of Los Angeles,* 340 U.S. 622, 623 (1951) ("If their judgment rests on an adequate state ground, we, of course, will not review those judgments"); *Williams v. Kaiser,* 323 U.S. 471, 473 (1945) ("Whatever the grounds of that decision it is binding on us insofar as state law is concerned"); *Iroquois Transport Co. v. De Laney Forge and Iron Co.,* 205 U.S. 354, 360 (1906) (case "presents a question of state law, upon which the judgment of the state court is final and conclusive").

Moreover, if the state court has based its judgment upon both state and federal grounds, either of which would be dispositive, this Court will not issue the Writ. *Henry v. Mississippi, supra,* and other cases cited therein; *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935); *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U.S. 157, 164 (1917).

The unanimous decision of the Supreme Judicial Court rests upon three independent lines of authority, any of which compels dismissal of the Union's action. The Supreme Judicial Court held that Goodman's references to "communism" did not give the Union a cause of action for defamation because they were statements of opinion on disclosed or assumed facts (P. 32-35) and, in any event, were too amorphous a characterization to be actionable (P. 35-36). Additionally, the Court held that even assuming the statements to be defamatory, the Union was a public figure and there was no genuine issue as to the Station's knowledge of falsity or reckless disregard of the truth because the Union had failed to present evidence warranting a finding of actual malice (P. 37-40).[5]

In concluding that the references to "communism" were non-actionable statements of opinion, the Court relied upon § 566 of Restatement (Second) of Torts (1977) (P. 33, 34, fn. 8, 35). Similarly, the Court relied upon fundamental principles of libel law, in holding that a charge of "communism" was too vague a characterization to be actionable (P. 35). Of course many of the cases cited include First Amendment discussions as it is virtually impossible to treat the law of defamation without reference to the strictures of the First Amendment, but the Court makes clear that if its result was not "constitutionally required, we would reach the same result, believing that the action is plainly without merit" (P. 39). Thus, even if the Supreme Judicial Court's view of federal law is erroneous, its statement that it would reach the same result regardless of federal constitutional requirements compels denial of the Union's petition.

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments not

[5] The Union appears to have misspoken in its statement of the Questions Presented where it asserts that the Supreme Judicial Court held it to be "a private figure thereby ruling inapplicable the 'active malice' standard" (P. 2). We discuss the state law basis for the Court's holding on the quantum of evidence necessary to defeat a Motion for Summary Judgment at part B.2., *infra.*

> to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal law, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945).

While the statement that "an assertion that cannot be proved false cannot be held libelous" (P. 36) may have arisen in the context of First Amendment analysis, see *Hotchner v. Castillo-Puche,* 551 F. 2d 910 (2d Cir. 1977), *cert. denied,* 434 U.S. 834 (1977), it also flows logically from the common law of defamation which establishes that truth is a defense, *Foss v. Hildreth,* 10 Allen (92 Mass.) 76 (1865); *Joyce v. George W. Prescott Pub. Co.,* 348 Mass. 790 (1965).

Surely, the failure of the Supreme Judicial Court of Massachusetts to follow the common law of the District of Columbia relied upon by the Union (P. 12) presents no federal question to be reviewed by this Court.

In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) this Court made clear that the standard of liability for defamation was to be established by the individual states, so long as they did not trench upon the First Amendment.

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

418 U.S. at 347.

The Union, asserting that it is a private figure (P. 15, 17), complains in essence that the Supreme Judicial Court has afforded greater protection against defamation actions for publishers and broadcasters than it finds in the decisions of this Court. Even assuming such to be the case, it is clear that a state court's decision to make state law favor freedom of expression at the expense of a plaintiff in a defamation action is not a federal question to be reviewed by this Court.

B. The Supreme Judicial Court of Massachusetts Correctly Applied the Applicable Principles of Federal Law.

1. *The Union is a public figure.*

In *Stone v. Essex County Newspapers, Inc.,* 367 Mass. 849 (1975), the Supreme Judicial Court adopted the test for determining whether a plaintiff in a defamation action is a public figure set forth by this Court in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974).[6]

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions. . . . We would not lightly assume that a citizen's participation in community and professional af-

[6] In *Stone,* the Court held that "the question whether the plaintiff is a public official or a public figure is one for the court to answer whenever (a) all of the facts bearing thereon are uncontested or agreed by the parties. . . ." 367 Mass. at 862. The factual underpinnings for such determination are uncontested in this case. The Union's affidavit in opposition sets forth its conclusion that "it should not be considered a public figure" (P. 104), but it does not and cannot contest the fact that it had chosen to publicly attack Goodman and the Station in an attempt to stifle opposition to its contract as well as actively participate in the debate surrounding the collective bargaining process and approval of the contract. Moreover, the Union sought and received access to the media to express its views (P. 81-84).

fairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, any individual should not be deemed a public personality for all aspects of his life. *It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.*

Gertz, supra at 351-353, quoted in *Stone, supra* at 866 (emphasis added.)

The Courts have consistently held in defamation actions that plaintiffs with varying degrees of prominence were "public figures." Included within the public figure category have been student leaders, private citizens who attempt to influence public opinion, authors, athletes, entertainers, and those involved in police-related activities.[7] Furthermore, the right of free expression concerning labor disputes has long been specially recognized. *Thornhill v. Alabama,* 310 U.S. 88,

[7] *El Paso Times, Inc. v. Trexler,* 447 S.W. 2d 403 (Tex. Sup. 1969) (university professor and leader of anti-war rally); *Klahr v. Winterble,* 4 Ariz. App. 158, 418 P. 2d 404 (1965) (member of student senate); *Associated Press v. Walker,* 388 U.S. 130 (1967) (former general and espouser of right-wing causes); *Pauling v. Globe-Democrat Pub. Co.,* 362 F. 2d 188 (8th Cir. 1966) (noted scientist and peace movement activist); *Hotchner v. Castillo-Puche,* 404 F. Supp. 1041 (S.D. N.Y. 1975) (author of a book entitled Papa Hemingway); *Guitar v. Westinghouse Electric Corp.,* 538 F. 2d 309 (2d Cir. 1976) (author of a book on property restrictions); *Time, Inc. v. Johnston,* 448 F. 2d 378 (4th Cir. 1971) (a former NBA player); *Cepeda v. Cowles Magazine & Broadcasting, Inc.,* 392 F. 2d 417 (9th Cir 1968), *cert denied,* 393 U.S. 840 (1968) (a major league baseball player); *Perry v. Columbia Broadcasting System, Inc.,* 499 F. 2d 797 (7th Cir. 1974), *cert. denied,* 419 U.S. 883 (1974) (Lincoln Perry a/k/a "Stepin Fetchit"); *Malerba v. Newsday,* — App. Div. 2d —, 406 N.Y.S. 2d 552 (1978); 19 ALR 3d (August 1978 Supp. P. 82 fn. [d]).

100-103 (1940); *Letter Carriers v. Austin,* 418 U.S. 264 (1974); *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966).

Here, the Union thrust itself to the forefront of the public controversy surrounding the collective bargaining process in order to influence the resolution of the items involved. See *Gertz, supra* at 345. It had been actively engaged in the collective bargaining process and the public debate leading to the contract between it and the Town of Ware. Its officials were attempting to persuade the voters of the Town to fund the contract and to publicly approve its terms and conditions. In Mr. Justice Powell's words, public figure status is attained ". . . by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention. . . ." *Gertz, supra* at 342.

Indeed, the Union did more than participate in the particular controversy giving rise to the defamation, it created the controversy by the deliberate employment of scare tactics in an attempt to silence opposition to public approval and funding of its contract.[8]

The Union asserts that it is not a public figure for purposes of this case because its "role was strictly limited to fulfilling its obligation as the bargaining representative, and providing certain benefits for its local membership" (P. 17). This claim is belied by the Union's admission that its officials and members were acting to persuade the voters of Ware to vote in favor of its proposed contract, and the evidence of newspaper coverage (P. 16). Moreover, the Union did not deny the fact, set forth in the Murphy affidavit, that the Union made

[8] Instituting this three million dollar libel action is more of the same tactic of cowing the opposition with outlandish threats rather than meeting it in debate on the merits. The Supreme Judicial Court considered the Union's damage claim to be so excessive as to question the propriety of Union counsel's conduct in signing the pleading. (P. 40 fn. 18).

public its letters threatening Goodman if he spoke out against the contract and complaining to the FCC about the Station's supposed anti-Union stance in the controversy (P. 91). In view of the Union's efforts to campaign in favor of its contract in the public press and elsewhere, it is frivolous for the Union to liken itself to the petitioner in *Gertz* who "played a minimal role . . . never discussed [any of the matters in issue] with the press and was never quoted as having done so." 418 U.S. at 352. On the undisputed facts in this case it is clear that the Union "thrust [itself] into the vortex of this public issue" and "engage[d] the public's attention in an attempt to influence its outcome." *Id.*

The Union's reliance upon *Time, Inc. v. Firestone,* 424 U.S. 448 (1976); *Hutchinson v. Proxmire,* — U.S. —, 99 S. Ct. 2675 (1979) and *Wolston v. Reader's Digest Association, Inc.,* — U.S. —, 99 S. Ct. 2701 (1979) (P. 16) is similarly misplaced. The Court was careful to point out that Mrs. Firestone did not resort to the press in an attempt to influence the resolution of her case. *Firestone,* 424 U.S. at 454, fn. 3. The *Hutchinson* and *Wolston* cases are similarly devoid of any suggestion that the plaintiffs chose to bring their side of the controversy into the public forum in an attempt to mold public opinion in their favor.

In short, this public employee union launched a public attack upon the Station and Goodman as well as engaged in a public campaign all to influence the resolution of a public controversy. Its "complete and enthusiastic involvement in the . . . controversy" cannot be denied and compels a finding that it is a public figure for purposes of this case. *Fram v. Yellow Cab Company of Pittsburgh,* 380 F. Supp. 1314, 1334 (W.D. Pa. 1974); *Gertz, supra; Linn v. United Plant Guard Workers, supra; Letter Carriers v. Austin, supra.*

2. *The Union did not show a genuine issue of fact as to actual malice.*

In spite of the obvious fact that the quantum of evidence necessary to create a genuine issue of material fact in connection with a Motion for Summary Judgment in a state court following state rules of civil procedure is clearly a matter of state law, the Union appears to claim that the Station's Motion for Summary Judgment should have been denied as a matter of federal law (P. 18-26). Nonetheless we believe that the cases discussed in Part A, *supra* require that the sufficiency of the evidence be measured first against state law and then against constitutional standards since this Court has held that the states are free to regulate the standard of liability for defamation so long as they do not impinge upon the protection granted to freedom of expression by the First Amendment. *Gertz, supra.*

The Massachusetts Rule concerning the adequacy of the evidence to support a Motion for Summary Judgment is quite clear. The Supreme Judicial Court has decided that once the moving party shows the absence of an issue of material fact, the opposing party must allege particular facts to avoid summary judgment.

> The inference to be drawn from the burden placed on the moving party is that his failure to establish the absence of a genuine issue of material fact must, without more from his opponent, defeat his motion. . . . On the other hand, *if the moving party shows that there is no issue for trial, the opposing party must respond and allege specific facts which establish that there is a genuine, triable issue, or summary judgment (if appropriate in all other respects) will be entered against him.* The parties' respective burdens are designed to discourage both "utterly unjustified motions for summary judgment" and "specious denials or sham defenses."

Community National Bank v. Dawes, 369 Mass. 550, 554 (1976) (emphasis added, citations omitted).

See also *Shapiro Equipment Corp. v. Morris & Son Construction Corp.*, 369 Mass. 968 (1976); *O'Brion, Russell & Co. v. LeMay*, 370 Mass. 243 (1976); *Commonwealth Bank & Trust Co. v. Plotkin*, 371 Mass. 218 (1976); *Smith v. Suburban Restaurants, Inc.*, Mass. Adv. Sh. (1978) 531; *Wagner v. Lectrox Corp.*, 4 Mass. App. Ct. 815 (1976); *John B. Deary, Inc. v. Crane*, 4 Mass. App. Ct. 719, 722-724 (1976); *Fay, Spofford & Thorndike, Inc. v. Massachusetts Port Authority*, Mass. App. Ct. Adv. Sh. (1979) 605, 610; J. Nolan, *Civil Practice*, 9 Mass. Prac. §421 at Supp. 45-46 (1979 Supp.).

The opposing party's burden of showing a genuine issue of material fact will only be met by the proffer of specific facts. Conclusory allegations which do not show their factual underpinnings will not avail. *Community National Bank v. Dawes, supra* at 554; *Commonwealth Bank & Trust Co. v. Plotkin, supra* at 221-222. Moreover, the opposing party may rely upon inferences to be drawn from the facts contained in the pleadings, affidavits and other material only when the opposing party has clearly set forth subsidiary facts in his pleadings or affidavits. *Community National Bank v. Dawes, supra* at 559, fn. 8; *Farley v. Sprague*, Mass. Adv. Sh. (1978) 385, 392.[9]

The Union did not traverse the factual allegations contained in the Station's affidavits in support of its Motion for Summary Judgment. The Union's only attempt to present additional facts bearing on the malice issue is contained in paragraph 9 of its affidavit which is made "on information and

[9] The Supreme Judicial Court's reference to federal summary judgment decisions in the opinion below does not indicate that it was applying federal law. Because the Massachusetts Rules of Civil Procedure track the Federal Rules, the Court refers to federal decisions to aid in interpreting the Massachusetts Rules. At the same time, the Court rejects those federal decisions which it does not find in harmony with its view of the proper workings of its rules. See, *Community National Bank v. Dawes, supra* at 553-556.

belief" (P. 104). It claims that the host of "Sound Off" knew of the Union's excellent reputation but deliberately and recklessly allowed the statement to be broadcast.[10] The general rule in Massachusetts is that "[a]ll affidavits or portions thereof made on information and belief, as opposed to personal knowledge, are to be disregarded in considering a motion for summary judgment." *Shapiro Equipment Corp. v. Morris & Son Construction Corp.*, 369 Mass. 968 (1976). Assuming that the Court could in its discretion accept any facts asserted in paragraph 9 because there was no motion to strike the matters alleged on information and belief, see *Stetson v. Board of Selectmen of Carlisle*, 369 Mass. 755, 763, fn. 12 (1976), examination reveals that it contains no facts beyond the assertion that Ms. Murphy knew of the Union's excellent reputation and that it was not in any way involved with communists or any communist movement. The remaining assertions which bear upon her subjective state of mind are nothing more than conclusions and assertions of ultimate facts and therefore are wholly inadequate to create a genuine issue of material fact. *O'Brion, Russell & Company v. LeMay*, 370 Mass 243, 244-245 (1976); *Wagner v. Lectrox Corporation*, 4 Mass. App. Ct. 815, 816 (1976); *Berman v. Drake Motor Lines, Inc.*, Mass. App. Ct. Adv. Sh. (1978) 678 at 687; 10 Wright and Miller, Federal Practice and Procedure, § 2738 at 695-696.

[10] The affidavit also claims that this broadcast was part of the Station's "concerted effort to deliberately undermine the reputation of the police force in Ware, Massachusetts, and the IBPO, to inhibit the force's ability to function efficiently and effectively and to inhibit the IBPO's ability to act as the bargaining agent for the police force" (P. 104). Even if these conclusions as to general ill will are accepted as true, they are simply not material to the existence of actual malice. *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82-83 (1967); *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *St. Amant v. Thompson*, 390 U.S. 727, 732-733 (1968).

The willful or reckless state of mind necessary to a finding of actual malice may be determined "on the basis of an inference drawn from objective evidence." *Stone, supra* at 868. The Union did not choose to put on the record any objective evidence to warrant such an inference, nor did it contest the facts placed on the record by the Station.[11]

Turning now to the constitutional standard, we note first that this Court has established a narrow test for determining the existence of actual malice.

> There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts as to the truth of his publication.*

St. Amant, supra at 731 (emphasis added).

Under this test, ill will or enmity is not to be considered, *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler,* 398 U.S. 6, 9-10 (1970); *Garrison v. Louisiana,* 379 U.S. 64, 78 (1964); *Beckley Newspapers Corp. v. Hanks, supra; Rosenblatt v. Baer, supra,* nor is intent to inflict harm. *Henry v. Collins,* 380 U.S. 356, 357 (1965) (per curiam). Failure to investigate the truth or to substantiate information gained is insufficient, in itself, to show actual malice. *Gertz v. Robert Welch, Inc., supra* at 332; *New York Times Co. v. Sullivan,* 376 U.S. 254, 287 (1964). There cannot be reckless disregard of truth where a false report is based upon a good faith, rational interpretation of something newsworthy. *Time, Inc. v. Pape,* 401 U.S. 279, 290-92 (1971). Nor does failure to seek out the plaintiff to verify facts constitute reckless disregard of truth. *Hurley v. Northwest Publications, Inc.,* 273 F. Supp. 967 (D. Minn. 1967), *aff'd on opinion below,* 398 F. 2d 346

[11] As the Supreme Judicial Court noted, if the Union required additional time or further discovery to learn of such evidence, it could have availed itself of the provisions of Mass. R. Civ. P. 56(f) relating to continuances for the purpose of gathering evidence (P. 39).

(8th Cir. 1968). Finally, reliance on information from a normally reliable and accurate source negates the possibility of actual malice. *New York Times Co. v. Sullivan, supra* at 287-288; *Miller v. News Syndicate Co.,* 445 F. 2d 356, 357-58 (2d Cir. 1971); *Trails West, Inc. v. Wolff,* 32 N.Y. 2d 207, 219 (1973); *Walker v. Pulitzer Publishing Company,* 394 F. 2d 800, 805 (8th Cir. 1968).

Contrary to the assertions of the Union at P. 21-22, Ms. Murphy did not agree that the Union was an "inroad of communism." At most, she agreed with the theoretical proposition that "if we do not get together and stop the inroad of communism, something will happen" (P. 93). Later, when Goodman stated that the inroad of communism was the Union, she advised him not to "stoop to a very low level" (P. 96-97). Still later in the same broadcast, Ms. Murphy expressed her belief that Goodman, in analogizing the Union's tactics to those of totalitarianism, had not identified the police with communists.

> Mr. Goodman did not say anything about the Police Department being Communist. What he said was the infringement upon a basic American Democratic right, and that is the right to free speech, is being infringed upon by this union, this International Union of Brotherhood of Police Officers that is coming in, and first of all telling the Chairman of the Board of Selectmen, an elected official of the taxpayers, that he cannot speak, and secondly, is now saying that the radio station, which is licensed to serve community needs is not doing that and is now on a, I believe the word is, vocal vendetta. . . . [A]s far as Mr. Goodman saying anything about the Police Department being communist, you're incorrect. What he

was saying is that this union is attempting to subvert the right to free speech. . . .[12]

(P. 99-100.)

Examples of conduct which may evidence "actual malice" are radically different from the foregoing and from anything the Union can offer. This is not a case where the defendants used a "calculated falsehood" or a "known lie." *Garrison v. Louisiana, supra* at 75. Nor is this a case ". . . where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call," or where ". . . the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation," or ". . . where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant v. Thompson, supra* at 732 (1968).

This is simply a case where the Chief Executive Officer of the Town of Ware aired his views; a contrary opinion was expressed by a member of the listening public; the Union itself was given an opportunity to respond on the very eve of the vote in issue; and the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open" was preserved and protected as well. *New York Times Co. v. Sullivan, supra* at 270. Clearly, Goodman's metaphor was "no more than rhetorical hyperbole, a vigorous epithet" which was a constitutionally protected part of the debate on a public issue. *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, supra* at 14; *Letter Carriers, supra,* 418 U.S. at 284.

[12] The Supreme Judicial Court found Murphy's remarks to be highly probative of a mind free of actual malice, based upon state rules of evidence (P. 38).

Conclusion.

For the foregoing reasons, the respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

By its Attorneys,

EVAN T. LAWSON,
HOWARD J. WAYNE,
LAWSON & WAYNE,
99 High Street,
Boston, Massachusetts 02110.
(617) 542-4010

Of Counsel:

MARK L. ROSEN, ESQUIRE,
SIFF & NEWMAN, P.C.,
233 Broadway,
New York, New York 10007.

Appendix A.

MASS. R. CIV. P. 56

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at

the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy; and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits

to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.